(25,126)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 843.

SWIFT & COMPANY, PLAINTIFF IN ERROR,

vs.

THE HOCKING VALLEY RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Swift & Company, plaintiff in error, and The Hocking Valley Railway Company, defendant in error, the same being Case No. 14901 upon the dockets of the Supreme Court of Ohio, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and manifest error hath happened to the great damage of Swift & Company, as by their complaint appears. We being

2 willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in their behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, the 26 day of January, 1916.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY,
Clerk of the United States District Court,
Southern District of Ohio.

The above Writ of Error allowed this 26th day of January, A. D. 1916.

HUGH L. NICHOLS,
Chief Justice Supreme Court of Ohio.

3 [Endorsed:] No. 14901. Swift & Company, a corporation, Plaintiff, vs. The Hocking Valley Railway Company, a corportation, Defendant. Writ of Error. Filed Jan. 26, 1916. Supreme Court of Ohio, Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

4 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 31st day of January, A. D. 1916.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

5 In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Petition for Writ of Error.

Considering itself aggrieved by the final decision and judgment of the Supreme Court of Ohio in rendering final judgment against it in the above entitled case, the plaintiff in error, Swift & Com-

pany, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court.

Assignment of errors herewith.

WILLIAM L. DAY,
SQUIRE, SANDERS & DEMPSEY,
ALBERT H. & HENRY VEEDER,
Attorneys for Plaintiff in Error, Swift & Company.

STATE OF OHIO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Swift & Company to The Hocking Valley Railway Company in the sum of One Thousand Dollars ($1,000), such bond when approved to act as a supersedeas.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated January 26, 1916.

[Endorsed:] Filed Jan. 26, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk.

6 In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error and files herewith its petition for a writ of error, and for cause says there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment.

The Supreme Court of Ohio erred in holding and deciding that it had no jurisdiction to consider and determine the effect and legal validity of certain demurrage rules contained in a local freight tariff which was posted, published and filed with the Interstate Commerce Commission on the 26th day of February, 1910, by The Hocking Valley Railway Company, defendant in error. The material portion of said rules is as follows:

"Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

After all the expiration of the free time allowed, a charge of One Dollar per car per day, or fraction of a day, will be made until car is released.

Private cars in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

Empty private cars are in railroad service from the time they are placed by the carrier for loading, or tendered for loading on the orders of a shipper. Private cars are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry
7 upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at end until the lading is duly removed."

The validity of said rules was denied by said plaintiff in error, Swift & Company, on the ground that the rules were repugnant to the provisions of the Act to Regulate Commerce, as amended, and to the Constitution of the United States, and in contravention of both.

Said errors are more particularly set forth as follows: the Supreme Court of the State of Ohio erred in holding and deciding—first, that the demurrage rules of The Hocking Valley Railway Company contained in their local freight tariff had been approved by the Interstate Commerce Commission within the scope of the authority that the Commission had conferred upon it by the provisions of the Act to Regulate Commerce; second, that the Supreme Court of the state of Ohio and the other courts of the state of Ohio could not, and had no jurisdiction to, judicially determine the legal validity of said rules under the provisions of the Act to Regulate Commerce and the Constitution of the United States, and thus deprived the plaintiff in error, Swift & Company, of its property without due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Ohio further erred in not holding and deciding—first, that the demurrage rules of the defendant in error, The Hocking Valley Railway Company, contained in their local freight tariff abridged the privileges and immunities of citizens and of this plaintiff in error, Swift & Company, as guaranteed by the Fourteenth Amendment of the Constitution of the United States; second, that the demurrage rules of the defendant in error, The Hocking Valley Railway Company, contained in its local freight tariff did deprive this plaintiff in error, Swift & Company, of its property without due process of law, as guaranteed by the Fifth Amendment of the Constitution of the United States;
8 third, that the said demurrage rules contained in defendant in error's (The Hocking Valley Railway Company) local freight tariff were not lawful tariffs or lawful demurrage rules in so far as the said rules provided for the payment of demurrage on private cars owned by the plaintiff in error, Swift & Company, when on the private tracks exclusively owned and under possession and control of Swift & Company, within the meaning of the Act to

Regulate Commerce, as amended, and were repugnant to the said Act to Regulate Commerce and in contravention thereof.

For which errors, the plaintiff in error prays the judgment of the said Supreme Court of Ohio, dated December 7th, 1915, be reversed and a judgment entered for the said plaintiff in error, and for costs.

WILLIAM L. DAY,
SQUIRE, SANDERS & DEMPSEY,
ALBERT H. & HENRY VEEDER,
Attorneys for Swift & Company, Plaintiff in Error.

[Endorsed:] Filed Jan. 26, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk.

9 [Endorsed:] No. 14901. Swift & Company, a Corporation, Plaintiff, vs. The Hocking Valley Railway Company, a Corporation, Defendant. Petition for Writ of Error and Assignment of Errors. Filed Jan. 26, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Attorneys for Plaintiff in Error, Cleveland.

10 In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Hocking Valley Railway Company, a corporation, duly organized under the laws of the State of Ohio, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Ohio, wherein Swift & Company, a corporation, is plaintiff in error, and The Hocking Valley Railway Company is defendant in error, the same being Cause No. 14901 upon the dockets of said court, to show cause, if any there be, why the judgment rendered against Swift & Company, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Ohio, this 26th day of January, A. D. 1916.

HUGH L. NICHOLS,
Chief Justice Supreme Court of Ohio.

Attest:
FRANK E. McKEAN,
Clerk Supreme Court of Ohio.

CLEVELAND, OHIO, January 28, 1916.

The attorney of record for the defendant in error in the above-entitled case hereby acknowledges due service of the above citation and enters an appearance in the Supreme Court of the United States.

HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Attorneys for the Hocking Valley Railway Company.

H. H. McKEEHAN, *Counsel.*

11 [Endorsed:] No. 14901. Swift & Company, a Corporation, Plaintiff, vs. The Hocking Valley Railway Company, a Corporation, Defendant. Citation. Filed Jan. 31, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

12 In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Precipe.

To the Honorable Frank E. McKean, Clerk of the Supreme Court of the State of Ohio:

Will you kindly forward to the Clerk of the Supreme Court of the United States of America, Honorable James D. Maher, a complete transcript of the record in the above-entitled case, including a copy of the Court's opinion, together with—

1. A copy of the assignment of errors.
2. A copy of the prayer for reversal, as contained in the assignment of errors herein filed.
3. The original petition for writ of error, together with its allowance.
4. A copy of the bond and its approval.
5. The original writ of error with the allowance thereof.
6. Statement showing bond, petition for writ of error, copies of writ of error, and citation lodged with the Supreme Court of the State of Ohio.
7. The original citation with service thereof.
8. Return to the writ of error and statement of costs.

Respectfully yours,
SQUIRE, SANDERS & DEMPSEY,
Attorneys for Defendant in Error.

13 [Endorsed:] No. 14901. Swift & Company, a Corporation, Plaintiff, vs. The Hocking Valley Railway Company, a Corporation, Defendant. Precipe. Filed Jan. 26, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

14 Duplicate.

In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Bond.

Know all men by these presents, that we, Swift & Company, a corporation, as principal, and The National Surety Company, a corporation of the state of New York, as surety, are held and firmly bound unto The Hocking Valley Railway Company in the sum of One Thousand Dollars ($1,000) to be paid to the said obligee, its successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, or successors and assigns jointly and severally by these presents.

Witness the execution hereof this 26th day of January, A. D. 1916.

Whereas, the above named principal seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Ohio,

Now, therefore, the condition of this obligation is such that if the above named principal shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its appeal, then this obligation shall be
15 void, otherwise to remain in full force and effect.

SWIFT & COMPANY,
By SQUIRE, SANDERS & DEMPSEY,
Its Attorneys.

[Seal National Surety Company, New York, Incorporated 1891.]

NATIONAL SURETY COMPANY.
J. W. CARROLL, *Attorney in Fact.*

Attest:
JOHN B. DEMPSEY.
DAN F. CARROLL.

Bond approved and to operate as a supersedeas.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

January 26, 1916.
Duplicate.

16 STATE OF OHIO,
Franklin County, ss:

On the 25 day of January, A. D. 1916, before me personally appeared William L. Day, who being by me duly sworn deposes and says that he is a member of the firm of Squire, Sanders & Dempsey, Attorneys for Swift & Company, and that the execution of the foregoing bond on behalf of the said Company in the manner above set forth has been fully authorized by said Company.

WILLIAM L. DAY.

Sworn to, acknowledged before me, and subscribed in my presence this 25 day of January, A. D. 1916.

[Notarial Seal, Cuyahoga County, Ohio.]

W. LOWNIE FLEMING,
Notary Public.

17 STATE OF OHIO,
Franklin County, ss:

On this 26th day of January, A. D. 1916, before me personally appeared J. W. Carroll, known to me to be the attorney in fact of The National Surety Company of New York, the corporation described in, and which executed the annexed bond of Swift & Company, as surety thereon, and who being by me duly sworn deposes and says that he resides in the City of Columbus, State of Ohio; that he is attorney in fact of said The National Surety Company of New York, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the state of New York, and that said Company has complied with the provisions of the Act of Congress allowing certain corporations to be accepted as surety on bonds, and that the seal affixed to the annexed bond is the corporate seal of The National Surety Company, and was thereto annexed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney in fact for said Company, and that the assets of said Company, unencumbered and liable to execution, exceed its debts, claims and liabilities whatsoever greatly in excess of One Thousand Dollars ($1,000).

Sworn to before me and subscribed in my presence this 26 day of January, A. D. 1916.

[Notarial Seal, Franklin County, Ohio.]

CHARLES F. PRYOR,
Notary Public, Franklin County, Ohio.

Duplicate.

18 [Endorsed:] No. 14901. Swift & Company, a Corporation, Plaintiff, vs. The Hocking Valley Railway Company, a Corporation, Defendant. Bond. Filed Jan. 26, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

19 14901.

In the Supreme Court of Ohio.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILROAD COMPANY, a Corporation, Defendant in Error.

Motion for an Order in the Supreme Court of Ohio Directing the Court of Appeals of Cuyahoga County, Ohio, to Certify its Record in Cause No. 725 to the Supreme Court.

Squire, Sanders & Dempsey, Attorneys for Plaintiff in Error.

Filed May 8, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

20 In the Supreme Court of Ohio.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILROAD COMPANY, a Corporation, Defendant in Error.

Motion for an Order in the Supreme Court of Ohio Directing the Court of Appeals of Cuyahoga County, Ohio, to Certify its Record in Cause No. 725 to the Supreme Court.

Squire, Sanders & Dempsey, Attorneys for Plaintiff in Error.

21 In the Supreme Court of Ohio.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILROAD COMPANY, a Corporation, Defendant in Error.

Motion for an Order in the Supreme Court of Ohio Directing the Court of Appeals of Cuyahoga County, Ohio, to Certify its Record in Cause No. 725 to the Supreme Court.

Now comes the plaintiff in error, Swift & Company, and respectfully moves this Honorable Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify to this Court its

record in Cause No. 725 upon the docket of said Court of Appeals, wherein Swift & Company, a corporation, was plaintiff in error, and The Hocking Valley Railroad Company was defendant in error on the following grounds shown in the record, namely: (1) the case is of public and great general interest, (2) error has probably intervened.

22 This cause came into the Court of Appeals of Cuyahoga County on error from the Court of Common Pleas of that County, and was prosecuted in the former court to reverse a judgment recovered by the defendant in error, resulting from the overruling of a demurrer filed by plaintiff in error to the amended petition of the defendant in error. The Court of Appeals affirmed the judgment of the Court of Common Pleas and the plaintiff in error now moves this Court for an order directing the Court of Appeals to certify its record in this cause.

As The Hocking Valley Railroad Company was plaintiff in the Court of Common Pleas, and Swift & Company was the defendant, we will in the course of the discussion of the questions involved refer to the railroad company as the plaintiff, and Swift & Company as the defendant.

The questions all arise on demurrer, so of necessity there are no disputes in the record as to the facts.

Facts.

The amended petition discloses that The Hocking Valley Railway Company is engaged in interstate commerce, and that Swift & Company is engaged in the sale, storage and transportation of meat and meat products; that on February 26th, 1910, the Railroad Company posted, published and filed a local freight tariff, providing, among other things:

23 "Rule 1—Exceptions.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purposes, are subject to these demurrage rules, except as follows:

(*a*) Cars loaded with live-stock.

(*b*) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.

(*c*) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper."

"NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership."

"(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier

for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)"

"Rule 2—Free Time Allowed.

(*a*) Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

24 (*b*) Twenty-four hours (one day) free time will be allowed.

1. When cars are held for reconsignment or switching orders.

2. When cars destined for delivery to or for forwarding by a connecting line are held for surrender or bill of lading or for payment of lawful freight charges.

3. When cars are held in transit and placed for inspection or grading.

(*c*) Cars containing freight for trans-shipment to vessel will be allowed such free time at the ports as may be provided in the tariffs of the carrier."

The demurrage rules further provide:

"Rule 7—Demurrage Charge.

"After the expiration of the free time allowed, a charge of $1 per car per day, or fraction of a day, will be made until car is released."

The amended petition further alleges that Swift & Company shipped certain of its products from Chicago, Ill., to Athens, Ohio, in cars owned by Swift & Company; that these cars were placed by the Railroad Company upon the track at Athens, Ohio, exclusively occupied by Swift & Company, by virtue of a certain agreement entered into March 22nd, 1911, by the parties to this suit.

In addition to the allegations of the amended petition, for the purpose of review in the Court of Appeals, it was stipulated by the parties to the suit that the track on which the cars in question were placed was the private track of Swift & Company. Under the allega-

25 tions of the amended petition, the plaintiff makes claim for certain demurrage, contending that having delivered the private cars of Swift & Company into the custody of Swift & Company on its own private track, nevertheless, the cars having remained in the custody of Swift & Company for various periods of time beyond the free time allowed in the demurrage rules and so-called tariffs, the Railroad Company is entitled to recover the demurrage.

(*a*) *Public and General Interest.*

The record in th-s case presents three questions, namely:

First. Whether the rule adopted by the railroad company and filed with the Interstate Commerce Commission, undertaking to define the words "in railroad service," applies to private cars used by the railroad under the so-called mileage arrangement, when such cars are delivered to the owner upon his private side track; and

Second. Whether such private cars are "in railroad service" after delivery to the owner until the lading is removed; and

Third. (*a*) Whether the railroad company has the lawful power,

under the Interstate Commerce Act of the United States to subject private cars so used to its demurrage rules when such cars are
26 delivered to the owner on its own private side track; and if it has the power,

(*b*) Whether the record in this case shows that the railroad company has exercised such power.

That a final determination of these questions is of paramount interest to all the people of the State of Ohio seems apparent. Hundreds of manufacturing and industrial plants have paid railroad companies for building switches on their premises leading to their factories, which were designed and intended for their accommodation only; and the owners of many of such plants own private cars which are used exclusively by them in shipping their products to market, such cars being handled by the railroads under the so-called mileage arrangement; and if it is the law that when the railroad company builds such switch and so uses such cars, its interest in the switch and cars is superior to the rights of the owner and the railroad company may subject such cars to demurrage—then it is high time the manufacturing plants were finding it out.

Furthermore, charges of this nature are being made daily in every County in the State on a substantial portion of interstate and intrastate traffic, originating at or destined to points in Ohio and without further argument, the Court can readily see that this case is plainly within the contemplation of the provisions of the Constitution relative to the jurisdiction of this Court in cases of public and great general interest.

27 (*B*) *Probable Error.*

View of the Court of Appeals.

If we correctly understand the theory of plaintiff's case, and the conclusions of the Court of Appeals, it is evident that the Court of Appeals entertained the view that the rule in question applies to private cars delivered to the owner upon his private side track, and that it was within the lawful power of the plaintiff to adopt such rule under the Interstate Commerce Act of the United States and that the charges accrued under said Act of Congress and the rules and so-called tariff schedule "Publishing Allowances to Their Owners for Mileage on Private Cars."

The Court of Appeals also entertained the view that the defendant agreed to abide by the "tariff objected to and that the claim accrued under a contract of which that agreement was an integral part."

The Court of Appeals stated that this "tariff" was duly approved by the Interstate Commerce Commission of the United States and was agreed to by the defendant before the shipment of the cars in question.

We respectfully submit that this "tariff" was not approved by the Interstate Commerce Commission and that the Interstate Commerce Act of the United States contains no provision requiring or

authorizing the approval or disapproval of any tariff schedule filed by a railroad company naming charges for transportation or any service connected therewith.

28 And we further submit that the defendant did not agree to this "tariff" before the shipment of the cars in question or after the shipment, but on the contrary, the defendant denies that it agreed at any time to pay the charges in question and denies that the plaintiff is entitled to recover such charges in this proceeding by virtue of any provision contained in the Interstate Commerce Act of the United States or under the rule and so-called tariff schedule filed with the Interstate Commerce Commission.

We deny that this Act authorized the plaintiff to file such rule, if it applies to private cars delivered to the owner upon his own track, when such cars are used by a railroad under the so-called mileage arrangement, and we also deny that any rights accrued to the plaintiff by reason of the filing of such rule and so-called tariff. We do this for the reason that a tariff, within the meaning of the Act to Regulate Commerce, is a schedule of charges "for transportation" and that the failure of the defendant to unload its own cars standing on its own track was not "transportation" as defined by the Act.

Transportation, as defined by the Act, includes cars and services in connection with the receipt and delivery of property transported, when provided and furnished by the carrier.

Our contention is that the plaintiff did not provide and furnish "transportation" for which it seeks to collect the charges involved in this proceeding.

29 The "transportation," if failing to unload a privately owned car standing on the owner's track is "transportation" within the meaning of the Act, was provided and furnished by defendant and not by plaintiff.

The plaintiff filed with the Interstate Commerce Commission a document "Publishing Allowances to Their owners for Mileage on Private Cars." The Court of Appeals treated this document as a tariff schedule showing "charges for transportation" within the meaning of Section 6 of the Act, when in fact such document was not a tariff schedule within the meaning of the Act, and the Court of Appeals erred in so treating it and accepting it as evidence of the liability of the defendant.

Argument.

An examination of the amended petition makes it clear that Swift & Company had exclusive possession of this track and was occupying it and paying the railroad company compensation for its use. It is admitted that the cars were all owned by Swift & Company and were in the exclusive possession and use of Swift & Company.

It is further admitted that the railroad company paid no rental, demurrage or other charge on these cars and suffered no loss of earnings by reason of their standing on this private track.

30 The railroad does not claim that it had any right or power to repossess itself of the cars or demand that they be returned to the railroad.

Theory of Demurrage Charges.

The primary object of demurrage charges is to impose a penalty upon the consignee for two purposes; first: to speed the unloading of the car and so release the car for railroad service and also to relieve the track space occupied by it, and second: to recompense the owner for the car while thus detained.

Prior to the adoption of demurrage rules by the carriers, consignees frequently used railroad equipment as storage warehouses, not only to the detriment of the railroads, but of the general public, and regulation was absolutely necessary in the public interest.

The right of a common carrier to charge demurrage is based upon the theory that a consignee cannot detain cars belonging to the carrier either directly, or as in the case of what is known as foreign cars, where the carrier is responsible to their owner, and is paying per diem therefor, without paying a reasonable compensation for the use of the car. This right is further founded upon the ownership of the car by the carrier or his responsibility for it upon a per diem basis.

In the case now under consideration, the cars in question not being dedicated to public service, the unloading of the car
31 concerns no one but the owner, as the car belongs to him as does also the track upon which it stands, and further when unloaded the car can only be returned to transportation at the will of the owner so that no one except the owner can be in any way concerned.

The Term "Demurrage" Defined.

Demurrage is a charge for the use and occupation of a railroad car and the obstruction of a railroad track by the consignee for an unreasonable time after the contract for transportation and delivery of the freight has been fulfilled.

Schumacher vs. Chi. & N. W. Ry. Co., 69 N. E., 825.

Norfolk & West. Ry. Co. vs. Adams, Clement & Co., 90 Va., 393; 44 Am. St. Rep., 916; 18 S. E. Rep., 673; 22 L. R. A., 530.

Lehigh Valley R. R. Co. vs. United States, 188 Fed., 879, 885.

In the Lehigh Valley case the court said:

"It must be conceded that demurrage being a charge for the detention of a car because of the use of the car and track until unloaded is a terminal charge."

This statement shows clearly that the charge results from the use of the carriers' car and track, and we submit, therefore, that

there is no warrant in law for the exaction of such charge where it appears that the carrier does not own the car or track.

The term "demurrage" is applied to the damages to which
32 a shipper or consignee of goods over a railroad may become liable under an express or implied contract for the detention of cars, but no demurrage can be exacted by a carrier unless the delay in unloading is clearly attributable to the fault of the consignee.

4 R. C. L., 864, 865.

Classification of Cars Subject to Demurrage Rules.

Two classes of cars are separately dealt with in the demurrage rules, the first: cars belonging to the railroads, and the second: cars belonging to corporations or individuals other than common carriers, and the demurrage rules as interpreted affect both classes of cars equally, except that private cars standing upon the tracks of other private corporations, and also when standing upon tracks of owner, are released from demurrage after lading has been removed, while railroad company's cars standing upon the tracks of private corporations are subject to demurrage after lading has been removed and until cars are again taken into possession by the railroad company.

If demurrage is properly and lawfully assessable upon private cars under lading, standing upon the private tracks of another corporation, or when standing upon the private tracks of the owner, then it should certainly be assessable upon the same cars when empty.

In the case now before the Court, in which is involved
33 cars not dedicated to the public service, belonging to the defendant and standing upon the defendant's track, we submit that no demurrage is properly assessable either on the loaded or empty car, the railroad having performed its only function of transportation by hauling the car from point of origin to destination, receiving its legal rate therefore, and having placed the car upon the private track of the defendant is thereby relieved of all responsibility or liability for either the car or its contents.

We concede most fully the right of the carrier to charge demurrage upon its own cars standing under load either upon the carrier's tracks or upon private tracks, because the car belongs to the carrier and has a per diem value and being dedicated to public service should be returned to transportation within the free time, or the required demurrage be paid.

We concede further the right of the carrier to charge demurrage upon private cars standing under load upon the carrier's tracks, because the track space used is valuable and because further, the carrier's contract with the owner of the car is not completed until the car is returned to the owner.

For the sake of argument we are further willing to concede the right of a carrier to charge demurrage upon private cars standing

upon the private tracks of other corporations or individuals than the owner, because the contract with the car owner is not completed until the car is returned to the owner, but we believe in this
34 case that the penalty in the way of demurrage should accrue to the owner of the car and not to the railroad.

We, however, positively deny the right of a carrier to charge demurrage upon private cars standing upon the track of the owner, because all responsibility or liability of the carrier for either car or contents entirely ceases when car has been placed upon the owner's track, and this should apply to the car whether loaded or empty.

Vaughn vs. N. Y., N. H. & H. Ry. Co., 61 Atl. Rep. (R. I.), 695.

Furthermore, there is no warrant in law for such charge for the reason that the carrier provides no transportation service or any service connected therewith within the meaning of that term as used in Section 1 of the Act to Regulate Commerce of the United States.

These private cars are not dedicated to public use. They are the property of the defendant and are used solely in the transportation of its own products from the packing house to its branch houses or customers, and when not in use in that service are held idle upon the tracks of defendant, and while being so held are entirely outside of the jurisdiction or control of the plaintiff railroad or the Interstate Commerce Commission and no liability for them is upon the railroad.

35 *Discussion of Demurrage Rules.*

Demurrage is assessed as heretofore suggested, for the purpose of speeding the unloading and release and return of cars to transportation, to recompense owners for use of cars and unloading tracks.

We concede the right of charging demurrage while cars are in railroad service. But we deny the right of the railroad to arbitrarily determine for itself when cars are in railroad service. This is always a question of fact which the railroad must establish as a foundation for a claim for demurrage, and we submit that the record in this case does not show that these cars were in railroad service after they were delivered to defendant on its own private track. The plaintiff has undertaken to define the words "in railroad service" as applied to private cars in Rule 1, which reads:

"Private cars under lading are in railroad service until the lading is removed and cars are regularly released."

This interpretation as applied to private cars under load, standing upon the private tracks of the owner, in our opinion, is absolutely contrary to justice and equity and to the principles of common law and is not supported by any provision in the Interstate Commerce Act.

The plaintiff railroad having fulfilled its only function of transportation in hauling the loaded cars from point of origin to destination

and placing them on defendant's track at that point, all con-
36 trol of the cars being surrendered and all liability for car or contents being at an end, we cannot see how by any fiction of law, these cars can be deemed to be still in railroad service.

In further pursuance of this question, we call attention to the fact that these very same private cars, loaded at point of origin, could be held on defendant's track at that point for an unlimited time without any demurrage being assessed, this exception being provided for in the demurrage rules.

Central Commercial Co. vs. G. & S. I. R. R. Co., 23 Interstate Commerce Reports, 532.

We respectfully submit that if these private cars, loaded with defendant's goods could be held upon its own private tracks at point of origin, without the imposition of any demurrage, there is no good reason why demurrage should be assessed upon the same cars under lading and standing upon defendant's private track at destination.

Whether such private cars are "in railroad service" after delivery to the owner until the lading is removed.

When the plaintiff delivered these cars to the defendant upon its own private side-track, transportation ended and the cars thereupon ceased to be "in railroad service."

Vaughan vs. N. Y., N. H. & H. R. R., 61 Atlantic, 695 (R. I.).

37 The track was not in railroad service because it was not used for public traffic.

People vs. N. Y. C. & H. R. R. Co., 51 N. E., 312.

Rodefer vs. Pittsburg O. V. & C. R., 74 N. E., 183.

Receiving and delivering freight upon a private spur track is purely a matter of contract.

Yazoo & M. V. R. R. Co. vs. Fletcher, 56 So. (Miss.), 667.

A., T. & S. F. Ry. Co. vs. Interstate Commerce Commission, 188 Fed., 229.

The service performed by the plaintiff in drawing cars from its tracks to the defendant's warehouse was private transportation, without the power of the Interstate Commerce Commission to control.

Cancellation Joint Rates, C. Z. & G. R. R. Co., 27 I. C. C. Rep., 353.

Whether an Interstate common carrier has the lawful power under the Interstate Commerce Act of the United States, to subject private cars owned by shippers and hired to carriers upon a mileage basis, to demurrage when such cars stand upon the private track of the owner of the car.

A tariff within the meaning of Section 6 of the Act to Regulate Commerce is a schedule of charges for transportation, and we submit that the failure of the defendant to unload its own cars stand-

ing on its own track, was not "transportation" as defined by the Act.

38 Whether the rule adopted by the railroad company and filed with the Interstate Commerce Commission, undertaking to define the words "in railroad service," applies to private cars owned by shippers and hired to carriers upon a mileage basis, when such cars are delivered to the owner upon his private side-track.

The mileage basis is set forth in the so-called tariff schedule, "Publishing Allowances to Their Owners for Mileage on Private Cars." This rule provides that:

"Private cars under lading are 'in railroad service' until the lading is removed and cars are **regularly released.**"

The words in bold face clearly indicate, we think, that the rule was not intended to apply to private cars delivered to the owners upon his private side-track.

The Public Service Commission of Pennsylvania, in the case of Pittsburgh Plate Glass Company vs. Pennsylvania Railroad Company, Complaint Docket 227, has recently held that the language of this rule does not specifically refer to the case of the delivery of cars to their owner upon his own tracks, and that cars so delivered are not subject to demurrage.

The Public Service Commission of New York, Second District, in Decision No. 91, in the case of the General Electric Company vs. New York Central Railway Company, has rendered a decision to the same effect.

39 The Interstate Commerce Commission, in The Matter of Demurrage on Privately Owned Cars, 13 I. C. C. Rep., 378, held that private cars owned by shippers and hired to carriers upon a mileage basis are not subject to demurrage when standing upon the track of the owner of the car or the private tracks of the consignee.

The Interstate Commerce Commission.

The railroad is not seeking in this proceeding to recover compensation for any services rendered or performed by it or for the use and occupation of its property.

It bases its right of recovery solely on the rule in question, which it established and filed with the Interstate Commerce Commission.

The railroad company claims this rule was approved by the Interstate Commerce Commission and that the Courts of Ohio are, therefore, bound to enforce the rule regardless of the property and constitutional rights of the defendant.

The Interstate Commerce Commission is not a court, and is not vested with power to determine legal rights.

Barnes Interstate Transportation, p. 56.

Toledo Produce Exchange vs. L. S. & M. S. R. R. Co., 3 Interstate Commerce Reports, pp. 831-835.

Langdon vs. Ry. Co., 194 Fed., 486.

McBride Coal & Coke Co. vs. C. S. T. P. M. & O. Ry. Co., 13 I. C. C. Rep., 571.

Interstate Commerce Commission vs. L. & N. R. R. Co., 227 U. S., 88; 57 L. Ed., 431.

40 Nebraska-Iowa Grain Co. vs. Union Pacific Ry. Co., 15 I. C. C. Rep., 90-94.

Tap Line Cases, 234 U. S., 1.

The Interstate Commerce Commission has no power to require the owner of a private car to unload the car after it has been delivered to the owner on his own premises.

The Commission itself has held that it has no jurisdiction respecting private sidings.

Ralston Town Site Company vs. M. P. Ry. Co., 22 I. C. C. Rep., 354.

See also:

Cosby vs. Richmond Transfer Co., 23 I. C. C. Rep., 72-76.

The decision of the Court of Appeals seems to rest on a misconception of the powers of the Interstate Commerce Commission. The Court of Appeals sustained the rule under the impression that it had been approved by the Interstate Commerce Commission, and apparently uses the word "approved" in the sense of declaring the rule lawful. The Commission held the rule lawful in the sense that it did not violate any provision of the Interstate Commerce Act and in no other sense. The Interstate Commerce Act does not say that the schedules prepared by common carriers and submitted to the Commission are subject in any way to the latter's approval. Nothing is said in the Act about the concurrence or approval of the Commission.

Interstate Commerce Commission vs. Cincinnati, N. O. & T. P. R. Co., 167 U. S., 479; 42 L. Ed., 243, 255.

41 *Decision of the Interstate Commerce Commission in the Proctor & Gamble Case.*

The Railroad Company seems to rely upon the proceeding of the Interstate Commerce Commission brought by the Proctor & Gamble Company against the Cincinnati, Hamilton & Dayton Ry. Co., 19 Interstate Commerce Reports, 556.

The nature and character of this proceeding is best stated by Mr. Chief Justice White, who delivered the opinion of the Supreme Court of the United States when the case was before that court.

(Proctor & Gamble Company vs. United States, 225 U. S., 282; 56 L. Ed., 1091.)

The Chief Justice said:

"The Proctor & Gamble Company, dissatisfied with the regulations concerning demurrage, in so far as they imposed in certain respects charges on its tank cars, filed a complaint with the Interstate Commerce Commission, charging the rules to be repugnant to the Act

to Regulate Commerce because unjust and oppressive, and because to enforce them would create preferences and discriminations forbidden by the act.

After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the Act to Regulate Commerce, and on the contrary conformed to that act, and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied. * * *

The Proctor & Gamble Company then filed a petition in the
42 Commerce Court of the United States. The petition recited that the rules were repugnant to the Act to Regulate Commerce * * *

The conception upon which the petition was based was that the order of the Commission dismissing the complaint, was null and void and beyond the power of said Interstate Commission, in that it sustains the validity of * * * said demurrage rules."

The Commerce Court refused to set aside the order of the Interstate Commerce Commission on the ground that the rule was not repugnant to the Act to Regulate Commerce.

The contention which the Interstate Commerce Commission rejected in the Proctor & Gamble case was: That a privately owned car while standing upon a privately owned track should be free from demurrage even though the car was owned by one private interest and the track by another private interest.

There is no such contention in the case at bar.

The main question in the case at bar has recently been decided by the Public Service Commission of Pennsylvania in the case of Pittsburgh Plate Glass Co. vs. Pennsylvania R. R. Co., Complaint Docket 227, decided April 6, 1915. We quote the following from the Report of the Commission:

"Demurrage is a charge in the nature of a penalty for the unreasonable detention of cars which belong to the carrier or are in the service of the carrier under the terms of an agreement with
43 the owner either express or implied, and its purpose is to secure the prompt return of the cars. Under the facts of the present case the cars were not in the service of the carrier. They could not be used by the carrier for any other purpose than the service of the complainant. At the time the demurrage was attempted to be imposed these cars had been delivered to the complainant and its own cars filled with its own commodities stood upon its own tracks. The railroad company denies any liability for the cars or lading after delivery upon the owner's siding. Under these circumstances the reason for the enforcement of demurrage seems entirely to fail. Its enforcement could not compel the prompt return of the cars. The defendant had no right of any kind to the cars or their use or possession. The complainant after unloading might retain the cars and never return them. No right to possession upon the part of the railroad could be in any way maintained. If the complainant should choose to keep his goods in his cars awaiting a rise in the market or for some other reason, what ground could there be for the contention that they were in the service of the carrier? The argument that the

carrier ought to be enabled to know upon how many private cars it may depend in order that it may secure sufficient other cars for its service, fails in this situation because these cars could never have been depended upon for such service and the carrier could not have been misled. The contention that an advantage is given to the owners of private cars if demurrage be not charged, and that the result therefore is discrimination, also fails. There are certain advantages which follow from the ownership of capital, which
44 cannot be counteracted. The man who lays a switch has an advantage over one who depends upon carts. The man who buys a car pays less freight than others. This argument, if sound, could properly be extended to the ownership of the cars, to which the avoidance of demurrage is only an incident."

Whether the Record in This Case Shows that the Railroad Plaintiff Has Published in its Tariffs that it Will Use Privately Owned Cars and Pay for Such Use upon the Condition that Such Cars Shall be Subject to the Demurrage Rules.

The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. The contract under which the car enters the carrier's service is not required to be filed with the Interstate Commerce Commission. Section 15 of the Act provides, in substance, that, if the owner of property transported under the Act provides and furnishes any "transportation," such owner may receive from the carrier a reasonable allowance for such transportation. but the amount of the allowance is a matter of private contract. While the crrier's undertaking to transport the owner's freight is not a matter of private contract, the owner of a private car is required to pay the same freight charges as anyone else, and the schedules naming these charges are required to be filed with the Interstate Commerce
45 Commission under Section 6 of the Act. It is not true, therefore, that subjection to the demurrage rule was a condition attached to the use of defendant's cars. The Act to Regulate Commerce deals with only carriers and shippers. It does not deal with the owners of private railroad cars, but recognizes the right of carriers to use private cars and pay the owner reasonable compensation therefor, without publishing in its tariffs the amount of such compensation. Even common carriers subject to the Act, like the Pullman Company, publish tariffs only respecting their transactions with the public; that is, they do not publish tariffs covering their collections from the other common carriers over whose lines they operate.

Under Section 6 of the Interstate Commerce Act, the plaintiff is not required and is not entitled to file a tariff schedule showing the amount of compensation it will pay owners for the use of their private cars.

A common carrier has no right to use privately owned cars on its own terms. It must arrange the terms with the owner.

The question presented in the case now before this Court for consideration is a most serious one, and in the aspect in which it is at

present submitted is a new one. In conclusion, we wish to again earnestly call to the Court's attention that it is our claim that when a private car is standing upon a private track and the Railroad Company is paying no rental, and suffers no loss of earnings by
46 reason of the detention of the car or by reason of the use of the track, it has no right or power to repossess itself of the car. Such a car is not in railroad service, and there is no illegal discrimination in favor of the owner of the car or the shipper using such private car as against a shipper using a railroad car.

As to whether or not probable error has intervened, we have little to add beyond the earnest request that the Court will give due consideration to the authorities hereinbefore cited which, in our opinion, show that the courts below were in error in overruling the demurrer filed to the amended petition.

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY,
Attorneys for Swift & Company,
Plaintiff in Error.

47 In the Supreme Court of Ohio.

14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Error to the Court of Appeals of Cuyahoga County.

Record.

Squire, Sanders & Dempsey, Attorneys for Plaintiff in Error.
Hoyt, Dustin, Kelley McKeehan & Andrews, Attorneys for Defendant in Error.

Filed Jul- 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

48 In the Supreme Court of Ohio.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Error to the Court of Appeals of Cuyahoga County.

Record.

Squire, Sanders & Dempsey, Attorneys for Plaintiff in Error.
Hoyt, Dustin, Kelley McKeehan & Andrews, Attorneys for Defendant in Error.

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50 In the Supreme Court of Ohio.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Petition in Error.

(Filed in Supreme Court June 17, 1915.)

Plaintiff in error says that at the September term, 1914, of the Common Pleas Court of Cuyahoga County, Ohio, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in an action therein wherein the plaintiff in error was defendant, and the defendant in error was plaintiff; that thereafter plaintiff in error filed its petition in error in the Court of Appeals of said county to obtain a reversal of said judgment, to which error proceedings of said Court of Appeals the defendant in error herein was therein defendant in error; and that by the consideration of Said Court of Appeals at the January term, 1915, the said defendant in error recovered a judgment against plaintiff
51 in error by which the said Court of Appeals affirmed the said judgment of said Court of Common Pleas.

The original pleadings between the parties, and the papers and full record of said case, together with duly certified copies of the docket and journal entries in said Court of Common Pleas and in said Court of Appeals in said action, by an order of this court rendered June 4th, 1915, are filed in this court.

This plaintiff in error avers that there is error in said record and proceedings in said Court of Common Pleas and said Court of Ap-

peals and further says that said judgment of said Court of Appeals and the said Common Pleas Court, and the record thereon upon which the same is based, contains manifest errors to the prejudice of plaintiff in error in this, to-wit:

First. The said Common Pleas Court erred in overruling the demurrer of the defendant in error to the amended petition of the plaintiff in error.

Second. The judgment of the said Common Pleas Court is contrary to law.

Third. The said Court of Appeals erred in sustaining the rulings of said Common Pleas Court in overruling the demurrer of the plaintiff in error filed to the amended petition of the defendant in error.

Fourth. The judgment of the said Court of Appeals in sustaining the Common Pleas Court is contrary to law.

52 Fifth. The said Common Pleas Court and said Court of Appeals erred in not entering final judgment in favor of plaintiff in error.

Sixth. Judgment of the said Court of Appeals is contrary to the law applicable to the admitted facts as shown by the record.

Seventh. Other errors appearing upon the record.

Wherefore, the said plaintiff in error prays that the said judgment of the Court of Common Pleas and also the said judgment of the Court of Appeals in affirming the same may be reversed, and that said plaintiff in error be restored to all things that it has lost by reason thereof.

SQUIRE, SANDERS & DEMPSEY,
Attorneys for Plaintiff in Error.

(Waiver Omitted.)

Amended Petition.

(Filed in Common Pleas Court April 28, 1914.)

Now comes The Hocking Valley Railway Company, plaintiff herein, and says that it is a corporation organized and existing under the laws of the State of Ohio; that it is engaged in the business of transporting passengers and property for hire for all such persons, firms and corporations as may employ it; that, to carry on such business, it owns, maintains and operates a line of railway, together with numerous branches, switches, spurs and sid-

53 ings used in connection therewith, extending from Toledo, Lucas County, Ohio, in a southeasterly direction, through Athens, Athens County, Ohio, to points beyond.

Plaintiff further says that, although its said line of railway lies wholly within the State of Ohio, it nevertheless receives freight consigned from points outside this State to points within this State, and from points within this State to points outside the State; that, by reason of this fact, it is subject to, and is obliged to comply with, the terms and provisions of a law enacted to regulate commerce among the several states and with foreign nations, said law being commonly known and referred to as the Interstate Commerce Act.

Plaintiff further says, that in compliance with the terms and provisions of said Act, on the 26th day of February, 1910, it duly issued its local freight tariff, wherein and whereby it published certain car demurrage rules and charges, and duly filed said tariff or schedule with the Interstate Commerce Commission, and duly posted in two public and conspicious places in every depot, station or office of plaintiff, where passengers or freight were received for transportation, copies of said tariff or schedule. A true copy of said local freight tariff or schedule, containing said rules and charges, is hereto attached, marked Exhibit "A" and made a part hereof.

Plaintiff further says that said demurrage rules and
54 charges had theretofore been prepared and adopted by the National Association of Railway Commissioners and approved by the Interstate Commerce Commission, by a decision rendered by said Commission on the 14th day of November, 1910, in the case of Proctor and Gamble Company against Cincinnati, Hamilton & Dayton Railway Company, et al., which decision is reported in the 19th volume of the Interstate Commerce Commission Reports, pages 556 to 560, inclusive thereof, and which decision, approving said car demurrage rules and charges, is hereby referred to and made a part hereof, as though the same were fully written out at length herein.

Plaintiff further says that said car demurrage rules and charges were, by the express terms and provisions of said tariff, applicable at all stations and sidings, public and private, on plaintiff's line of railway, and to all interstate traffic on said line.

Plaintiff further says that said rules provided, in part as follows:

"Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

"After all the expiration of the free time allowed, a charge of One Dollar per car per day, or fraction of a day, will be made until car is released.

"Private cars in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

55 "Empty private cars are in railroad service from the time they are placed by the carrier for loading, or tendered for loading on the orders of a shipper. Private cars are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at end until the lading is duly removed."

Plaintiff further says that at all the times herein mentioned, the above quoted rules and charges were binding upon all shippers who delivered to plaintiff, for transportation, goods consigned from points outside this State to points within this State.

Plaintiff further says that the defendant herein is a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business in the City of Chicago, Illinois; that it is engaged in the business of preparing and packing meats and other like products, and shipping them to its numerous branch agencies throughout the United States, where the same are stored for sale and distribution.

Plaintiff further says that one of said branch agencies is located at Athens, Ohio, and that defendant makes frequent ship-
56 ments of its products from its packing house at Chicago, Illinois, to said agency at Athens, Ohio, over and along plaintiff's line of railway.

Plaintiff further says that defendant, at all times mentioned herein, occupied a certain switch or track at Athens, Ohio, under and by virtue of a certain agreement entered into by plaintiff and defendant on the 22d day of March, 1911, a true copy of said agreement is hereto attached marked Exhibit "B" and made a part hereof.

Plaintiff further says that during the period beginning April 1, 1910, and ending August 21, 1912, the defendant entered into certain contracts of carriage with plaintiff, whereby plaintiff agreed to receive, transport and deliver to defendant at Athens, Ohio, certain consignments of defendant's products, in consideration of which defendant agreed to pay to plaintiff the charges arising out of and connected with the transportation by plaintiff of said consignments, as provided in its lawful published tariff and lawful car demurrage rules and charges aforesaid.

Plaintiff further says that during the period beginning April 1, 1910, and ending August 21, 1912, and acting under and in pursuance of said contracts of carriage, it received from the defendant, from time to time, a large number of loaded cars consigned from points outside this State to the defendant at Athens, Ohio, all of which said cars were received by plaintiff and were by it transported and delivered to the defendant on the track occupied by
57 defendant under said agreement of March 22, 1911, at Athens, Ohio.

Plaintiff further says that defendant, at all of said times, was the owner of all of the above-mentioned cars so transported by plaintiff and delivered by it to defendant at Athens, Ohio.

Plaintiff further says that defendant paid to plaintiff the lawful tariff rate of freight for the transportation of the respective commodities with which said cars were loaded, and plaintiff, in accordance with its lawful published tariff paid to defendant, for the use of its refrigerator and tank cars, the sum of three-fourths cents per car per mile, and for the use of its other equipment, the sum of three-fifths cents per car per mile.

Plaintiff further says that it placed upon the side-track above referred to the various cars at the times shown upon the statement hereto attached, marked Exhibit "C" and made a part hereof; that the lading was not removed from said cars by the defendant within the free time allowed for unloading by the rules set forth in Exhibit

"A," but the defendant allowed and permitted said cars to remain upon said side-track under lading for the times stated in said Exhibit "C" so that the demurrage charges assessed under said rules aggregated the sum of Six Hundred and Fifty-six ($656.00) Dollars, and that defendant has wholly failed, neglected and refused to pay said sum, or any part thereof.

58 Wherefore, plaintiff asks judgment against the defendant in the sum of $656.00, with interest thereon at six per cent. (6%) per annum from the 21st day of August, 1912.

THE HOCKING VALLEY RAILWAY COMPANY,
By HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Its Attorneys.

(Duly verified.)

"EXHIBIT A."

G. F. O. No. B 1526 Cancels G. F. O. No. B 1412.
I. C. C. No. 1386 Cancels I. C. C. No. 1309.

The Hocking Valley Railway Co.
General Freight Department.

Local Freight Tariff
Naming
Car Demurrage Rules and Charges
Applying on
Interstate Traffic
At All Stations on the
Hocking Valley Railway

Issued February 26, 1910; effective April 1, 1910.
T. R. Limer, Superintendent Car Service, Columbus, Ohio.
Issued by H. Q. Wasson, General Freight Agent, Columbus, Ohio.
H. B. Dunham, Traffic Manager, Columbus, Ohio.

59 The following car demurrage rules will be applied at all stations and sidings (public or private) of this company *or* interstate traffic.

Rule 1—Exceptions.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

(A) Cars loaded with live stock.

(B) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.

(C) Empty private cars stored on carrier's or private tracks, pro-

vided such cars have not been placed or tendered for loading on the orders of a shipper.

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the
60 industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

Rule 2—Free Time Allowed.

(A) Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

(B) Twenty-four hours (one day) free time will be allowed.

1. When cars are held for reconsignment or switching orders.

2. When cars destined for delivery to or for forwarding by a connecting line are held for surrender of bill of lading or for payment of lawful freight charges.

3. When cars are held in transit and placed for inspection or grading.

(C) Cars containing freight for trans-shipment to vessel will be allowed such free time at the ports as may be provided in the tariffs of the carrier.

Rule 3—Computing Time.

NOTE.—In computing time, Sundays and legal holidays (national, state and municipal) will be excluded. When a legal holiday falls on a Sunday, the following Monday will be excluded.

61 (A) On cars held for loading, time will be computed from the first 7 a. m. after placement on public-delivery tracks.

(B) On cars held for orders, time will be computed from the first 7 a. m. after the day on which notice of arrival is sent to consignee. On cars held for unloading, time will be computed from the first 7 a. m. after placement on public-delivery tracks and after the day on which notice of arrival is sent to consignee.

(C) On cars containing freight in bond, time will be computed from the first 7 a. m. after permit to receive goods is issued to consignee by United States collector of customs.

(D) On cars containing freight subject to state inspection, time

will be computed from the first 7 a. m. after inspection by state officials.

(E) On cars to be delivered on any other than public-delivery tracks, time will be computed from the first 7 a. m. after actual or constructive placement on such tracks. See rule 4 (Notification) and rules 5 and 6 (Constructive Placement).

(F) On cars to be delivered on interchange tracks of industrial plants performing their own switching service, time will be computed from the first 7 a. m. following actual or constructive placement on such interchange tracks until return thereto. See rule 4 (Notification) and rules 5 and 6 (Constructive Placement). Cars returned loaded will not be recorded released until necessary billing instructions are given.

62 Rule 4—Notification.

(A) Consignee shall be notified by carrier's agent in writing, or as otherwise agreed to by carrier and consignee, within twenty-four hours after arrival of cars and billing at destination, such notice to contain point of shipment, car initials and numbers, and the contents, and, if transferred in transit, the initials and number of the original car. In case car is not placed on public-delivery track within twenty-four hours after notice of arrival has been sent, a notice of placement shall be given to consignee.

(B) When cars are ordered stopped in transit the party ordering the cars stopped shall be notified upon arrival of cars at point of stoppage.

(C) Delivery of cars upon private or industrial interchange tracks, or written notice to consignee of readiness to so deliver, will constitute notification thereof to consignee.

Rule 5—Placing Cars for Unloading.

(A) When delivery of cars consigned or ordered to private or industrial interchange tracks can not be made, on account of the act or neglect of the consignee, or the inability of consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks or because of
63 other conditions attributable to consignee. This will be considered constructive placement. See rule 4 (Notification).

(B) When delivery can not be made on specially designated public-delivery tracks, on account of such tracks being fully occupied, or from other cause beyond control of the carrier, the delivery will be made at the nearest available point accessible to the consignee and the consignee so notified.

Rule 6—Cars for Loading.

(A) Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must give the consignor written notice of all cars which he has been unable to place because of condition of the private track or because of other conditions attributable to the consignor. This will be considered constructive placement.

(B) When empty cars placed for loading on orders, are not used, demurrage will be charged from the first 7 a. m. after placing or tender until released, with no time allowance.

Rule 7—Demurrage Charge.

After the expiration of the free time allowed, a charge of $1 per car per day, or fraction of a day, will be made until car is released.

64 Rule 8—Claims.

No demurrage charges shall be assessed under these rules for detention of cars through causes named below. If, through error, demurrage charges are assessed or collected under such conditions, they shall be promptly canceled or refunded by the carrier.

Causes.

(A) Weather Interference.

1. When the condition of the weather during the prescribed free time is such as to make it impossible to employ men or teams in loading or unloading, or impossible to place freight in cars, or to move it from cars, without serious injury to the freight.

2. When shipments are frozen so as to prevent unloading during the prescribed free time, or when, because of high water or snowdrifts, it is impossible to get to cars for loading or unloading during the prescribed free time.

(B) Bunching.

1. Cars for Loading.—When by reason of delay or irregularity of the carrier in filling orders, cars are bunched and placed for loading in accumulated numbers in excess of daily orders. The shipper shall be allowed such free time for loading as he would have been entitled to had the cars been placed for loading as ordered.

2. Cars for Unloading or Reconsigning.—When, as a
65 direct result of the act or neglect of carriers, cars destined for one consignee, at one point, and transported via the same route, are bunched in transit and delivered in accumulated numbers in excess of daily shipments, claim to be presented to the carrier's agent before the expiration of the free time. The consignee shall be allowed such free time as he would have been en-

titled to had the cars been delivered in accordance with the daily rate of shipment.

(C) Demand of Overcharge.

When the carrier's agent demands the payment of transportation charges in excess of tariff authority.

(D) Delayed or Improper Notice by Carrier.

NOTE.—When notice has been given in substantial compliance with the requirements as specified by the rules, the consignee shall not thereafter have the right to call in question the sufficiency of such notice, unless within twenty-four hours after receiving the same he shall serve upon the delivering carrier a full written statement of his objections to the sufficiency of said notice.

(E) Railroad Errors or Omissions.

Rule 9—Average Agreement.

When a shipper or receiver enters into the following agreement, the charge for detention to cars, provided for by rule 7, on all cars held for loading or unloading by such shipper or receiver, shall be computed on the basis of the average time of detention
66 to all such cars during each calendar month, such average detention to be computed as follows:

(A) A credit of one day will be allowed for each car released within the first twenty-four hours of free time. A debit of one day will be charged for each twenty-four hours or fraction thereof that a car is detained beyond the first forty-eight hours of free time. In no case shall more than one day's credit be allowed on any one car, and in no case shall more than seven (7) days' credits be applied in cancellation of debits accruing on any one car.

(B) At the end of the calendar month the total number of days credited will be deducted from the total number of days debited, and $1 per day charged for the remainder. If the credits equal or exceed the debits, no charge will be made for the detention of the cars, and no payment will be made to shippers or receivers on account of such excess of credits, nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

(C) Credits earned on cars belonging to one class of equipment shall not be used in offsetting debits accruing on cars belonging to a different class of equipment. For the purpose of applying this provision, cars shall be deemed to consist of two classes: (1) Box cars, including refrigerator cars; (2) freight cars of all other descriptions.

(D) A shipper or receiver who elects to take advantage of
67 this average agreement shall not be entitled to cancellation or refund the demurrage charges under sections A and B of Rule 8.

(E) A shipper or receiver who elects to take advantage of this average agreement, may be required to give sufficient security to the carrier for the payment of balances against him at the end of each month.

Agreement.

To —— Railroad Company:

In accordance with the terms of rule 9:

I (or we) do expressly agree with the above-named railroad company that I (or we) will make prompt payment of all car-service charges accruing in accordance with such rule during the continuance of this agreement on cars held for loading or unloading by me (or us) or on my (or our) account at * * * station of the above-named railroad company. This agreement is to take effect ——, 19—, and to continue until terminated by thirty days' written notice to the railroad company.

—— ——.

Approved and accepted by and on behalf of the above-named railroad company by

—— ——.

68 EXHIBIT "B."

License.

Memorandum of agreement, made this twenty-second day of March, A. D. 1911, by and between The Hocking Valley Railway Company, a corporation existing under the laws of the State of Ohio, hereinafter known as the "Railway Company," party of the first part, and Swift & Company, a corporation whose principal place of business is in Chicago, County of Cook, State of Illinois, hereinafter known as the "Licensee," party of the second part, Witnesseth:

Whereas, the Licensee, at its own request, desires to occupy a tract of ground belonging to the Railway Company at Athens, Ohio, for the purpose of maintaining thereon a ware house and office in connection with its business at that point, together with all the improvements and appurtenances thereto, in such a manner as not in any way to interfere with the premises, buildings, structures, tracks or business of said Railway Company, upon the following described premises, to-wit:

The Northeast part of outlot No. 112 and the Northwest part of outlot No. 113, in the Village of Athens, Ohio, fronting 175 feet on the South side of State Street, immediately West of the premises occupied by the Standard Oil Company, said tract extending Southward from said street to the North side of the Railway Company's siding, known as the "Bank Track" as will more clearly
69 appear shaded in yellow on blue print hereto attached and made a part hereof, for a period of five (5) years, beginning

on the 1st day of November, 1910, at a rental of Thirty ($30.00) Dollars per annum, payable annually in advanee on the following terms and conditions, to-wit:

First. This agreement shall not be assigned by the Licensee without the written consent of the Railway Company being first obtained, and in case the said Licensee shall permit its interests to be seized or sold under legal process, this agreement shall thereupon become null and void.

Second, The switch of the Railway Company hereby let and connected with its main line, shall at all times be under control of the Railway Company.

Third. The Railway Company shall have the right at all times to enter upon the premises hereby let, for the purpose of repairing or maintaining the track thereon, or switching or removing cars thereover.

Fourth. Either party hereto may terminate this agreement at any time, after giving to the other party thirty (30) days' notice in writing, and at or before the termination of said thirty (30) days said Licensee shall at its own expense remove all said improvements from said premises, without causing damage of any kind to the property of the Railway Company. Upon its failure to do so within said time the Railway Company may make such removal at the sole cost of the Licensee.

70 Fifth. The Licensee shall pay all taxes assessed upon improvements upon said premises or said premises by reason thereof and will at all times hereafter indemnify and save harmless the Railway Company, its successors and assigns, from and against all loss, costs, charges and accidents whatsoever, which it may suffer, sustain or in any wise be subjected to, on account of injuries accruing to its property, or loss or damage to the property of any other person or corporation, arising out of, resulting from or in any manner caused by the construction, erection, maintenance, presence or use of said improvements installed or existing under this agreement, and said Railway Company shall not be liable in any way for any loss or damage to said improvements or to any property belonging to or in the possession or control of said Licensee on or about said premises, resulting from the operation of and use of its railway, engines, cars or machinery, or by reason of fire or sparks therefrom, or any other casualty arising from the use and operation of its railway, and shall be held forever free and harmless by said Licensee from any such liability.

Sixth. The Licensee shall consign all products shipped to it, intended to be placed on the siding hereby let, where the rates and services are equal, via the line or lines of the Railway Company, and shall give said Railway Company the long hauls thereof.

71 Seventh. The Licensee hereby accepts the License herein made with the above specified terms and conditions, and agrees that any failure or default on its part as to either of the same, may be held and considered a forfeiture and surrender of this License by it.

In Witness Whereof, the parties hereto have caused this instrument to be executed in duplicate, on the day and year first above written.

THE HOCKING VALLEY RAILROAD COMPANY,
(Signed) By W. L. MATTOON, *Real Estate Agent.*
SWIFT & COMPANY,
(Signed) By L. B. SWIFT.

Witness:
(Signed) E. OSLER HUGHES.
Witness:
(Signed) D. E. HARTWELL.

Demurrer.

Filed in Common Pleas Court May 20, 1914.

Now comes the defendant and demurs to the amended petition of the plaintiff filed herein, for the reason that the facts stated in said amended petition are not sufficient to constitute a cause of action.

SQUIRE, SANDERS & DEMPSEY,
Attorneys for Defendant.

Stipulation.

Filed in Common Pleas Court Nov. 4, 1914.

For the purpose only of reviewing the judgment of the
72 Common Pleas Court on defendant's demurrer to the amended petition, it is stipulated by the parties hereto that the track on which the cars in question were placed was the private track of Swift and Company.

THE HOCKING VALLEY RAILROAD COMPANY,
By HOYT, DUSTIN, KELLEY, McKEEHAN & ANDREWS,
Its Attorneys.
SWIFT & COMPANY,
By SQUIRE, SANDERS & DEMPSEY,
Its Attorneys.

Docket and Journal Entries.

In the Court of Common Pleas, September Term, 1912.

Dec. 12, 1912.—Petition Exhibit, and precipe filed and Summons issued.

Dec. 23, 1912.—Summons returned; endorsed on the 9 day of Dec., 1912. I served this writ on the within named Swift and Co.,

a corporation, by delivering a true and certified copy thereof with all the endorsements thereon to F. J. Dambach, agent in charge of the business of said corporation and the person designated by the corporation, as provided by law upon whom service of process against said corporation *were* had within the state.

January Term, 1913.—Sheriff Hirstius. Fees, $.91.

Jan. 31, 1913.—Consent hereby given defendant to move or plead by March 1, 1913.

73 Jan. 3, 1914.—Consent hereby given defendant to move or plead by 1/24/14.

Jan. 22, 1914.—Consent hereby given defendant to move or plead by Jan. 31, 1914.

April Term, 1914.

April 28, 1914.—Amended Petition Filed.

May 20, 1914.—Demurrer by defendant to amended petition filed.

June 20, 1914.—To Court—This case is advanced and set for hearing on June 22, 1914.

September Term, 1914.

Journal 195, Page 520.

Nov. 4, 1914.—Stipulation filed.

Nov. 5, 1914.—To Court—This cause coming on to be heard on the 2d day of November, A. D. 1914, upon the defendant's demurrer to the amended petition and on argument of counsel, the Court, being duly advised in the premises, holds that said demurrer is not well taken, and that the same ought to be, and is, hereby overruled. The defendant not desiring to plead further, final judgment on said demurrer is rendered in favor of the plaintiff, as prayed for in the amended petition, to all of which the defendant excepts. Journal 197, page 440.

Dec. 3, 1914.—Petition in error filed in Court of Appeals by defendant.

Petition in Error.

(Filed in the Court of Appeals Dec. 3, 1914.)

Now comes Swift & Company, plaintiff in error, and says
74 that on or about the 5th day of November, 1914, during the September, 1914, term of the Common Pleas Court of Cuyahoga County, Ohio, the defendant in error recovered a judgment by consideration of said court against said plaintiff in error in an action therein, wherein the plaintiff in error was defendant and the defendant in error was plaintiff. A transcript of the journal and docket entries therein is filed therewith. Plaintiff in error says that there is error in said record and proceedings in this, to-wit:

(1) That the Court erred in overruling the demurrer of the de-

fendant in error to the amended petition of the plaintiff in error, to which rulings the plaintiff in error at the time excepted.

(2) The judgment of the Court is contrary to law.

(3) For other errors apparent upon the face of the record.

Plaintiff in error therefore prays that said judgment of the Court below may be reversed and that it may be restored to all things it has lost by reason thereof.

SQUIRE, SANDERS & DEMPSEY,
Attorneys for Plaintiff in Error.

We hereby waive summons of error and enter our appearance herein.

THE HOCKING VALLEY RAILWAY COMPANY,
By HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Its Attorneys.

75 *Docket and Journal Entries.*

In the Court of Appeals.

Error to Common Pleas.

Filed June 17, 1915.

December 3, 1914.—Petition in Error, Waiver of Process, Transcript and original papers from Common Pleas filed.

December 29, 1914.—Brief by plaintiff in error with two copies and proof of service filed.

January 22, 1915.—Brief by defendant in error with two copies and proof of service filed.

February 11, 1915.—Reply brief of plaintiff in error with two copies and proof of service filed.

February 25, 1915.—Supplemental brief by defendant in error with two copies filed.

March 1, 1915.—To Court: This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error its cost herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution. To all of which plaintiff in error excepts.

Journal 2, page 107.

No. 14901.

Attorneys.	Title of case.	Action.	Fees & costs.	Paid by—
Squire, Sanders & Dempsey, Cleveland;	Swift & Company, a Corporation,	Motion for an Order Directing the Court of Appeals of Cuyahoga County to certify its record. Error to the Court of Appeals of Cuyahoga Co.	Petition..... $5.00	Squire, Sanders & Dempsey.
	v.		Motion..... 2.00	Squire, Sanders & Dempsey.
Hoyt, Dustin, Kelley, McKeehan and Andrews, Cleveland.	The Hocking Valley Railway Company, a Corporation.			

Docket Entries.

Date. 1915.	Memoranda of pleadings, etc., filed, writs issued, etc.	Oral argument.
May 8th.	Motion for an order to the Court of Appeals to certify its record, and notice of hearing May 20th, filed.	
" "	Ten printed copies of motion and memoranda in support filed.	
" "	Proof of service of motion and memoranda filed.	
" "	Ten printed copies brief opposing motion, and proof of service, filed by defendant.	

June 4th. Motion for an Order directing the Court of Appeals of Cuyahoga County to certify its record, allowed. J. 27—page 121.
" " Order No. 50 issued to Clerk of Court of Appeals of Cuyahoga County, to certify record.
" 17th. Petition in error and waiver of summons and entry of appearance filed.
" " Court of Appeals transcript and Original Papers filed.
" " All papers sent Gates Legal Publishing Company by express.
July 10th. " " returned by " " " " "
" 10th. Printed record and proof of service filed.
Aug. 13th. Plaintiff's printed brief and proof of service filed.
Sep. 8th. Request for Oral Argument filed by Squire, Sanders & Dempsey,
" " " " " " " " Hoyt, Dustin, Kelley, McKeehan & Andrews.
" 24th. Defendant's printed brief filed. 9/25/15, proof of service filed.
Oct. 16th. Plaintiff's printed reply brief filed. 10/16/15, proof of service filed.
Nov. 15th. Additional points for Oral argument filed by defendant.
Dec. 7th. Judgment affirmed. Opinion. J. 27—page 213.
" 14th. Oiginal Papers sent to Clerk.

1916.

Jan. 26th. Mandate issued (by order of Chief Justice).
" " Petition for Writ of Error (allowed by Nichols, Chief Justice) filed.
" " Assignment of Errors filed.
" " Writ of Error filed.
" " Bond in sum of $1,000.00, signed by Swift & Company as principal, and by National Surety Company of New York, as surety (approved by Nichols, C. J.,), filed.
" " Precipe for transcript filed.
" " Citation issued for defendant (taken by Mr. Dempsey).
" 31. Citation, and acknowledgment of service thereof, returned and filed.

77 Supreme Court of the State of Ohio.

No. 14901.

Journal Entries.

1915.

June 4th. Motion for an order directing the court of appeals of Cuyahoga County, to certify its record.

"It is ordered by the court that this motion be, and the same hereby is, allowed." J. 27—page 121.

Dec. 7th. "This cause came on to be heard upon the transcript of the record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—. Ordered, that a special mandate be sent to the Common Pleas Court of Cuyahoga County to carry this judgment into execution. Ordered, that a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, 'for entry.'" J. 27—page 213.

[Endosed:] Supreme Ct. of Ohio. 14901. Swift & Co. vs. The Hocking Valley Ry. Co. Transcript of Docket and Journal Entries.

78 SWIFT & COMPANY
vs.
THE HOCKING VALLEY RAILWAY COMPANY.

Where a demurrage rule, named in the tariff filed by an interstate railroad with the interstate commerce commission and published according to law, has been passed upon and approved by the commission acting within the scope of its authority, the decision of that tribunal is binding upon the state courts and the question of the validity of the rule is not open for consideration in an action brought by the railroad company to recover the charges assessed under the rule as to cars engaged in interstate commerce.

(No. 14901—Decided December 7, 1915.)

Error to the Court of Appeals of Cuyahoga county.

79 The action out of which this error proceeding arises was brought by defendant in error against plaintiff in error in the court of common pleas of Cuyahoga county to recover demurrage. The amended petition was challenged by demurrer for the reason

that it did not contain facts sufficient to constitute a cause of action. The demurrer was overruled and plaintiff in error not desiring to plead farther judgment was rendered in favor of defendant in error in the amount claimed in the amended petition and this judgment was affirmed by the court of appeals.

The averments of the amended petition are in substance as follows:

Plaintiff is a railroad company engaged in interstate commerce and is subject to and is obliged to comply with what is known as the Interstate Commerce Act of the United States. In compliance with this act, on February 26, 1910, it issued and filed with the interstate commerce commission and duly posted as required by law its local freight tariff containing car demurrage rules and charges. These demurrage rules and charges had theretofore been prepared and adopted by the National Association of Railway Commissioners and approved by the interstate commerce commission on November 14, 1910, in the case of Proctor & Gamble Co. v. The C. H. & D. Ry. Co., in the 19th volume of the interstate commerce commission's report, page 556. According to the terms and provisions of the
80 tariff filed by plaintiff, the car demurrage rules and charges were applicable at all stations and sidings, public and private, on its line of railway and to all interstate traffic on its line.

These demurrage rules provided in part as follows:

"Forty-eight hours (two days) free time will be allowed for loading or unloading on all commodities.

"After all the expiration of the free time allowed, a charge of one dollar per car per day, or fraction of a day, will be made until car is released.

"Private cars in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"Empty private cars are in railroad service from the time they are placed by the carrier for loading, or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at end until the lading is duly removed."

The above rules were binding upon all shippers who de-
81 livered to plaintiff, for transportation, goods consigned from points outside of the state to points within the state. Defendant occupied a certain railroad switch or track at Athens, Ohio, under and by virtue of an agreement entered into by plaintiff and defendant March 22, 1911. During the period beginning April 1, 1910, and until August 21, 1912, defendant entered into certain contracts to carry with plaintiff whereby the latter agreed to receive, transport and deliver to the defendant at Athens certain consignments of defendant's products in consideration of which defendant agreed to

pay to plaintiff the charges arising out of and connected with the transportation by plaintiff of said consignments, as provided in its lawful published tariff and lawful car demurrage rules and charges. During the period referred to, and according to and in pursuance of said contracts of carriage plaintiff received from the defendant from time to time a large number of loaded cars consigned from points outside of the state to the defendant at Athens. All of these cars were received by plaintiff and transported and delivered to the defendant on the track occupied by the defendant under the agreement of March 22, 1911. Defendant at all said times was the owner of all the cars so transported by plaintiff and delivered by it to the defendant at Athens. Defendant paid to plaintiff the lawful tariff rate of freight for transportation of the commodities with
82 which said cars were loaded and plaintiff in accordance with its lawful published tariff paid defendant for the use of its refrigerator and tank cars the sum of ¾ cents per car per mile and for the use of its other equipment the sum of 3/5 cents per mile.

Plaintiff placed upon the side track referred to various cars at the times shown by a statement marked Exhibit C. The lading was not removed from these cars by the defendant within the free time allowed for unloading according to said demurrage rules, but it allowed and permitted the cars to remain upon the sidetrack under lading for the time shown by said statement. The demurrage charges assessed under said rules aggregated the sum of $656 which defendant has neglected and refused to pay.

A copy of the local freight tariff, naming the demurrage rules and charges, is attached to the amended petition, as are also Exhibit C and the agreement of March 22, 1911.

For the purpose of reviewing the judgment of the court of common pleas on defendant's demurrer to the amended petition, it was stipulated by the parties that the track on which the cars in question were placed was the private track of the defendant, Swift & Company.

Messrs. Squire, Sanders & Dempsey, for plaintiff in error.

Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews, for defendant in error.

83 NEWMAN, *J.*:

The rule under which the demurrage was charged and upon which plaintiff predicated its right of recovery provides for the collection of demurrage for the detention of private cars while ~~unloaded~~ under lading on private tracks. It is averred in the petition and admitted by the demurrer that the plaintiff, engaged in interstate commerce, was obliged to and did, in compliance with the interstate commerce act, file with the interstate commerce commission its tariff or schedule in which were published certain demurrage rules including the one in question. It is claimed, however, that within the meaning of the interstate commerce act, tariff is a schedule of charges "for transportation" and that transportation as defined by the act includes cars

and services in connection with the receipt and delivery of property transported when provided and furnished by the carrier. We cannot agree with counsel that the term is used in this narrow sense. In Section 8563, U. S. Comp. Stat., 1913, which is a part of the interstate commerce act, the term "transportation" is defined. It includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling property
84 transported. It is to be observed that it includes cars and all instrumentalities and facilities of shipment or carriage, irrespective of ownership. In these schedules the carrier, under the provisions of Section 8569, is required to state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require. It was held in Lehigh Valley Railway Co. v. United States, 188 Fed., 879, that the demurrage charged for the detention of cars in loading or unloading is a terminal charge required to be shown by the schedule of rates filed and published by an interstate railway company.

We do not think there can be any question but that, under the plain provisions of the interstate commerce act, demurrage rules relating to private cars employed in interstate commerce and the charges accessable thereunder are matters properly included in the tariff or schedule required to be filed and published. This tariff containing the demurrage rule having been filed and published according to law was binding alike on carrier and shipper and so long as it was in force was to be treated as though it were a statute. Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S., 184. The freight rate charged for transportation by the carrier was the one fixed by the tariff and the amount prescribed therein for the use of private cars was the one paid to plaintiff in error. But it is claimed that the demurrage rule in question is unlawful and therefore unenforceabe. The matter under consideration has to do with interstate commerce. It was held in the Minnesota Rate
85 Cases, 230 U. S., 352, that the authority of congress extends to every part of interstate commerce and to every instrumentality by which it is carried on and a full control by congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.

In the case of Proctor & Gamble Co. v. C. H. & D. Ry. Co., 19 I. C. C. R., 556, the identical rule here in question was passed upon by the interstate commerce commission. The contentions made by counsel here were made by complainant there, yet that tribunal held that the railway company was within its lawful rights in establishing and maintaining the rule complained of. But it is insisted that the commission had no authority to decide the question it did decide and that it had no power to approve such a rule. We shall review briefly the proceedings had in that case.

Relief having been denied it by the commission, the Proctor & Gamble Company filed a petition in the commerce court of the

United States, in which it was charged that the order of the commission dismissing the complaint was null and void and beyond its powers in that it sustained the validity of the demurrage rules. The jurisdiction of the commerce court was challenged by the United States and the interstate commerce commission appearing for that purpose, and the commerce court in disposing of the case held that it had jurisdiction and on the merits decided that the commission had rightly refused to grant relief and there was no foundation for the contention that the property of the company in its private cars was taken without due process of law by the demurrage regulation. The case was taken on appeal to the Supreme Court of the United States by the Proctor & Gamble Company and that court held that the commerce court erred in taking jurisdiction of the matter, upon the ground that the act creating the commerce court, giving it jurisdiction of cases brought to enjoin, set aside, annul or suspend orders of the interstate commerce commission, conferred on that court jurisdiction only to entertain complaints as to affirmative orders of the commission and therefore it had no jurisdiction to redress complaints based exclusively, as in the case under consideration, on the ground that the commission had refused the relief on the ground that it could not award it. Mr. Justice White in the opinion, 225 U. S., 282, refers to the interstate commerce commission as an administrative body endowed with what may be in some respects qualified as quasi judicial attributes, and he says on page 292: "The question to be decided is this: does the authority with which the commerce court is clothed in view of these provisions invest that body with jurisdiction to redress complaints based exclusively upon the conception that the interstate commerce commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused * * *?" It seems clear to us from the language used by the learned jurist—"in a matter submitted to its judgment and within its competency to consider"—that the question presented was one which the commission had the lawful right to decide and that it did not exceed its authority when it acted in the matter.

86

87

Counsel assert that they are making no claim that the rule complained of is unreasonable but insist that it is unlawful and invalid. But the distinction if there be one is not material, for the rule was assailed in the Proctor & Gamble case before the commission upon the same grounds urged against its validity here, nevertheless the rule received the sanction and approval of the commission and its validity was within its competency to consider. It called for the exercise of the powers and discretion conferred by congress upon the commission. Morrisdale Coal Co. v. Pennsylvania Railroad Co., 230 U. S., 304.

Under the provisions of the interstate commerce act, it was the positive duty of the carrier to collect the charges provided for in the tariff, and this is the purpose of the present action. The demurrage rule upon which plaintiff relies relates to interstate commerce. It was passed upon by a federal tribunal with full authority to act and was approved. If the power existed in the courts of the

states to question its rulings, it would result, most likely, in diverging opinions and conflicting decisions in matters of interstate commerce and would be destructive of the uniformity of regulation which the interstate commerce act was designed to secure. It is admitted by the demurrer that the transportation of the cars in question was
88 subject to the demurrage rule set out in the tariff which was binding upon the shipper. This rule having been approved by a federal tribunal acting within the scope of its authority its decision must be followed by the courts of this State and be given full force and effect.

Judgment affirmed.

Johnson, Donahue, Jones and Matthias, JJ., concur.

89 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio of the Term of January, A. D. 1916.

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing (11 pages) is a true and correct copy of the opinion of the Supreme Court of Ohio, in case No. 14901, which case was decided by this Court December 7, 1915; said Cause No. 14901 being entitled: Swift & Company v. The Hocking Valley Railway Company.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 26th day of January, 1916.

[Seal of the Supreme Court of the State of Ohio.]

E. O. RANDALL, *Reporter.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled E. O. R. 1/26/16.]

90 *Certificate of Lodgement.*

SUPREME COURT,
State of Ohio, ss:

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on January 26th, 1916, in case No. 14901, Swift & Co. vs. The Hocking Valley Railway Company:

1. The original bond, a copy of which is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.
3. One copy of petition for writ of error, order of allowance thereof, and assignment of errors.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Court at my office in Columbus, Ohio, this 31st day of January, 1916.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

91 In the Supreme Court of Ohio.

No. 14901.

SWIFT & COMPANY, a Corporation, Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error.

Certificate.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation for defendant in error and its entry of appearance, and precipe for transcript of record, are the original papers filed in this Court in the above entitled cause; that the copy of the bond is a true copy of the bond filed in said cause; that the printed copies of motion for an order directing the court of appeals of Cuyahoga County to certify its record and of the record hereto attached are true copies of said motion and record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court; and that a duly certified copy of the opinion of the Court is attached hereto.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 31st day of January, A. D. 1916.

[Seal of the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Endorsed on cover: File No. 25,126. Ohio Supreme Court. Term No. 843. Swift & Company, plaintiff in error, vs. The Hocking Valley Railway Company. Filed February 11th, 1916. File No. 25,126.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 376.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

REPLY BRIEF
ON BEHALF OF PLAINTIFF IN ERROR.

SQUIRE, SANDERS & DEMPSEY,
M. HAMPTON TODD,
WILLIAM L. DAY,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

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REPLY BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Counsel for defendant in error state in their brief that counsel for plaintiff in error had ignored the proposition that the Interstate Commerce Commission have exclusive jurisdiction of the questions involved in this case and that the ruling of the case by the Supreme Court of Ohio is in conformity with the decisions of this Court to that effect. We know of no decisions in this or any other court, nor have counsel cited any decisions which hold that in a case like the one under consideration the Interstate Commerce Commission have exclusive jurisdiction of the questions involved. In our main brief (page 14) we state:

> "The question presented in this case could be raised by proceedings in equity to enjoin the plaintiff below from enforcing the rule in question on the ground that it is an unlawful rule and not based upon a transportation service or by doing as it did do in this particular case, raise the question by way of defense to an action to recover the damages claimed for the alleged violation of the rule."

We did not elaborate the argument on this point because we did not deem it necessary and our only apology for adding to it now is the somewhat extended and elaborate printed argument of the defendant in error to the contrary. If we understand the defendant in error's contention, it is like this:

That the tariff, including the demurrage rules in question having been filed with and approved by the Interstate Commerce Commission, that body has exclusive jurisdiction to pass upon the legality of the provisions in the tariff so filed; that the Courts of the land by reason of the Act of Congress creating the Interstate Commerce Commission have been deprived of their jurisdiction to protect the citizen's rights of property and the guardianship of these rights has been transferred to an administrative body. If the position of the defendant in error is sound, then a provision in a carrier's tariff in excess of the authority of the Act of Congress or one that deprived the citizen either of the equal protection of the laws or took his property without compensation, then his sole hope of relief would be in the action of an administrative body and not in the Courts of the land. In view of the ruling of this Court in the Proctor and Gamble case, that there is no appeal from a negative administrative order of the Interstate Commerce Commission, then if the citizen should apply to the Interstate Commerce Commission for relief on the ground that his constitutional rights had been invaded and they denied him relief, he would be remediless. Surely a proposition that is capable of such a result is not sound. In addition, there are many cases in the reports where the Interstate Commerce Commission has made an administrative order, the enforcement of which has been restrained by the Courts of law. Probably as good an illustration of this as any of the many that might be cited is Interstate Commerce Commission vs. Diffenbaugh, 222 U. S. 42.

We also desire to call attention to the language of the Chief Justice in Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S. 452, where in delivering the opinion of the Court he says (page 469):

> "In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906, Sec. 15, Act June 29, 1906, C. 3591, 34 Stat. 584, 589, it is now provided that 'all orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended **or set aside by a court of competent jurisdiction.**' The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.
>
> Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, **(a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made**; and (c), a proposition which we state independently, although in its essence it may be contained in the previous one, viz.: whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Telegraph Cable Company vs. Adams, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose dis-

charge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

To the same effect see also Tap Line Cases, 234 U. S. 1.

That the Ohio Courts had jurisdiction to determine the validity of the demurrage rules in question, see Kells Mill & Lumber Company, Inc. vs. Pennsylvania Railroad Company, 98 Atl. Rep. 309, in which Kalisch, J. says:

"(3) We now turn to a consideration of the challenge made by the counsel for appellant to the jurisdiction of the state court to entertain the present action. The argument advanced by counsel for appellant, is, in substance, that, the shipment being interstate, the demurrage which was claimed to have accrued is governed exclusively by the provisions of the Interstate Commerce Act. (U. S. Comp. Stat. sections 8563-8604) and the tariff filed with the Interstate Commerce Commission in pursuance thereof; hence the state court is without jurisdiction because it was not within the power of the state court to decide whether demurrage had or had not accrued under the schedule filed by the appellant, but that that power was exclusively conferred by Congress upon the Interstate Commerce Commission or the federal court. This position is manifestly untenable. The cases cited by counsel for appellant to sustain the novel proposition urged upon us not only utterly fail in that respect, but, on the contrary, clearly recognize the jurisdiction of the state courts to deal with matters, which are or may be in a measure regulated and governed by the Interstate Commerce Act or the Carmack Amendment. The courts of this state have repeatedly dealt, unquestioned, with matters governed by these federal acts. Spada vs. Penn. R. R. Co., 86 N. J. Law, 187, 92 Atl. 379; Olivit Bros. vs. Penn. R. R. Co., 96 Atl. 582; Carr, et al. vs. Penn. R. R. Co., 96 Atl. 588.

There is nothing in either of the federal acts invoked which either expressly or impliedly forbids the state court from entertaining jurisdiction in a case like the one under discussion. The fallacy of the theory that the state court is without jurisdiction lies in the failure to properly distinguish between actions which are brought for violation or enforcement of the provision of the federal statutes referred to, and which for that reason are only cognizable in the federal tribunal, and actions at law brought independently of the federal statutes for some wrong done, and the federal statutes come incidentally into operation by reason of some regulatory provision contained therein, as in the case sub judice. In the former class of actions there is no doubt but that the federal courts and Interstate Commerce Commission have exclusive jurisdiction, but not so in the latter.

The action which the plaintiff below instituted was not one dealing with discrimination in rates or the like, but that the appellant's charge for demurrage in this particular case was not warranted by its own regulation; that is, that it charged for something not contracted for. This was, obviously, not assailing the legal efficacy of the rule or tariff regulation. If the carrier had delivered the lumber and sued for demurrage, is there any question but that the state court could have entertained jurisdiction? We think not."

In the pending case we have the tariff, including the demurrage rules, filed with and approved by the Interstate Commerce Commission and they remain binding upon all parties until in the language of the Act of Congress they are set aside by a Court of competent jurisdiction. Our contention is that the Courts of Ohio were Courts of competent jurisdiction in which the validity of the rule filed and approved by the Interstate Commerce Commission can be legally tested and if the demurrage rule in question is either in excess of the power conferred by the Act of Congress or is inhibited as being an invasion of the plaintiff in error's constitutional rights, it

was the duty of the Courts of Ohio to have so construed and declared the law.

The defendant in error in its brief contends that the demurrage rules in question are binding upon the plaintiff in error because when the plaintiff in error delivered its car to the carrier they assented and agreed to the demurrage rules which had been filed with the Interstate Commerce Commission and promulgated, which required the payment of the demurrage charges sued for in this action.

In this connection we desire to call attention to the averment in the defendant in error's amended petition in the Common Pleas Court of Ohio (record page 26) wherein it is averred:

> "Plaintiff further says that during the period beginning April 1, 1910, and ending August 21, 1912, the defendant entered into certain contracts of carriage with plaintiff, whereby plaintiff agreed to receive, transport and deliver to defendant at Athens, Ohio, certain consignments of defendant's products, in consideration of which defendant agreed to pay to plaintiff the charges arising out of and connected with the transportation by plaintiff of said consignments, as provided in its **lawful** published tariff and **lawful** car demurrage rules and charges aforesaid."

We admit our liability to pay the lawful charges of the carrier. Our contention in this case is that the demurrage charges sought to be recovered are unlawful because, first, the charge is not for a transportation service within the meaning of the Act to Regulate Commerce, and second, the charge deprives the plaintiff in error of the use of its property without compensation.

All of which is respectfully submitted.

SQUIRE, SANDERS & DEMPSEY,
M. HAMPTON TODD,
WILLIAM L. DAY,
Attorneys for Plaintiff in Error.

No. 376.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

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SWIFT & COMPANY,
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Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

HOYT, DUSTIN, KELLEY,
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JAMES H. HOYT,
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SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

Counsel for plaintiff in error in their brief against the motion to dismiss or affirm (pages 13-27 of which stand as their principal brief in the case), advance a contention which was not made in the assignment of errors nor in the specification of errors, namely that the demurrage rule when correctly construed does not provide for demurrage in those cases where the private cars belong to the owner of the private track on which they stand under lading, as in the case at bar, but only to cases where the cars stand under lading on the private track of another than their owner (see pp. 25-27 of brief of plaintiff in error). It is possible that this claim was not sufficiently considered in the principal brief for defendant in error, and counsel for defendant in error have therefore determined not to rely wholly on their oral argument in dealing with the same, but to present their views upon this subject by this supplemental brief, which they respectfully ask the Court to consider in connection with their principal brief in the case.

The argument of counsel for defendant in error as to the construction of this demurrage rule is (1) that the controlling part of the rule is the phrase "and cars are regularly released;" (2) that the cars cannot be released to the owner on his own track, and hence the rule does not extend to cases where the owner of the car is also the owner of the track, but includes only those cases where the private car stands upon the private track of another; (3) that since Swift & Company owned both the cars and track, the present case falls outside the rule, so that no demurrage accrued under it.

Since there is no mention of such a claim either in the assignment of errors or in the specification of errors, it is doubtful whether it ought now to be urged. However, there are several reasons why the contention is entirely without force.

The language of those parts of the rule referred to in the brief of plaintiff in error is:

> "Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership * * *.
>
> "Private cars under lading are in railroad service until the lading is removed and cars are regularly released * * *."

The entire rule is found on page 28 of the record and deserves careful examination.

First of all, it is clear that the language of this rule does not require the construction urged by plaintiff in error, for the operation of the rule according to its terms is not confined to cases where the car is standing on the private track of another.

Second: The construction urged is not only not required by, but is contrary to, the express language of the rule itself. The provision that "private cars under lading are in railroad service until the lading is removed

and the cars are regularly released," is surely not to be so interpreted as to restrict the class "private cars" to those which stand on the private tracks of another, for the rule expressly includes "private cars * * * whether on carrier's or private tracks." The terms "private cars" and "private tracks" are not limited, but embrace all private cars standing under lading on all private tracks. To attempt to interpret the rule by reading into it a limitation so as to make it include only those private cars which stand on the private tracks of a third person would not be an interpretation of the rule, but rather a limitation upon it, unwarranted because contrary to the plain and express requirements of the language itself, and would amount to the adding of a restrictive term not now found in the rule, and which, as we will show, is contrary to the purpose actuating its adoption.

Third: What is the meaning of the phrase, "and cars are regularly released?" The true and natural meaning of this language becomes at once apparent when the question is asked, "Released from what?" Obviously "from railroad service," for that is the burden with which the cars from the beginning of their use in interstate traffic have been impressed, and from which they are now to be discharged. The rule when read in its entirety explicitly defines when private cars go into railroad service empty, and when they are released from railroad service when unloaded. The verb "are released" refers to the thing from which they are to be released, to-wit, the railroad service into which they have been introduced, and not to the person to whom they are to be released.

The railroad service of private cars standing on the private tracks of their owner automatically ends when the lading is removed, for under those circumstances the removal of the lading in and of itself effects the release

of the cars. The words "the lading is removed" are in this case synonymous with and equivalent to the phrase "are regularly released," and if there is any further meaning to be attached to the latter phrase it is only in those cases where the car does not belong to the owner of the track on which it was standing. In such case notice to the carrier when the car was unloaded might at most be necessary to effect its release. That the phrase doubtless refers to cases of this kind finds support in the last clause of the rule, which deals only with private cars standing on the private track of their owner and which provides "if returned under lading railroad service is not at an end until the lading is duly removed," nothing being said about the cars being released. In other words, the absence of the phrase in that part of the rule which deals only with cases where the cars belong to the owner of the private track, and its presence in that part which deals with private cars which do not, as well as those which do, belong to the owner of the track, satisfactorily explains the use of this phrase, and clearly shows that it does not have the meaning claimed for it by counsel for plaintiff in error.

Obviously exception "C" mentioned by counsel throws no light on the question, as that clause deals only with **empty** private cars not in railroad service.

Fourth: The rule when interpreted as we claim it should be helps to fulfill the manifest purposes of the Interstate Commerce Act, whereas the other interpretation tends to thwart these purposes. If the demurrage were collected only when the car stood on the private track of another than the owner of the car then the ownership of the track would work a discrimination between consignees, the very thing which, as pointed out by the Commission in the Proctor & Gamble case, the rule was designed to prevent. By holding that in both cases the car

remains in railroad service until the lading is removed, this evil is avoided and the purpose of the Act fulfilled.

Fifth: The removal of the lading is in every case a condition precedent to the release of the car from railroad service and the car remains in railroad service until the lading is removed. The amended petition alleges, and the demurrer admits that the private cars of Swift & Co. were placed on its private track, that the lading was not removed within the free time allowed for unloading by **these demurrage rules**, so that the demurrage charges assessed under the **rules** aggregated the amount sued for. (R. pp. 26-7.) We respectfully submit that in view of this admission of record, Swift & Co. cannot now take the position that these rules have no application to the case at bar.

Sixth and finally: It is to be observed that nowhere in the Proctor & Gamble case, either in the opinion rendered by the Interstate Commerce Commission (19 I. C. C. Rep., 556), nor in that rendered by the Commerce court (188 Fed., 221), nor in the final opinion rendered by this Court (225 U. S., 282) is there the slightest intimation that the phrase in question should be given the meaning urged by plaintiff in error. On the other hand, the extended discussion by each of these tribunals proceeds on the ground that the rule applies to cases where the car stands under lading on the private track of its owner, for such was the case there as well as here. And it may well be said that by virtue of those decisions the interpretation now defended by us was conclusively established, for in entering into the contracts of carriage the parties thereto will be presumed to have used and understood the language of this demurrage rule as it was interpreted in those decisions, so that in legal effect, such interpretation entered into and became a part of the common understanding of the parties, and therefore part of the

contracts under which these cars were placed in railroad service. This interpretation is alleged in the amended petition and admitted by the demurrer, and it is not now open to plaintiff in error to deny its existence as a part of the contract between the parties.

Respectfully submitted,

HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Defendant in Error.

JAMES H. HOYT,
C. M. HORN,
Of Counsel.

No. 376.

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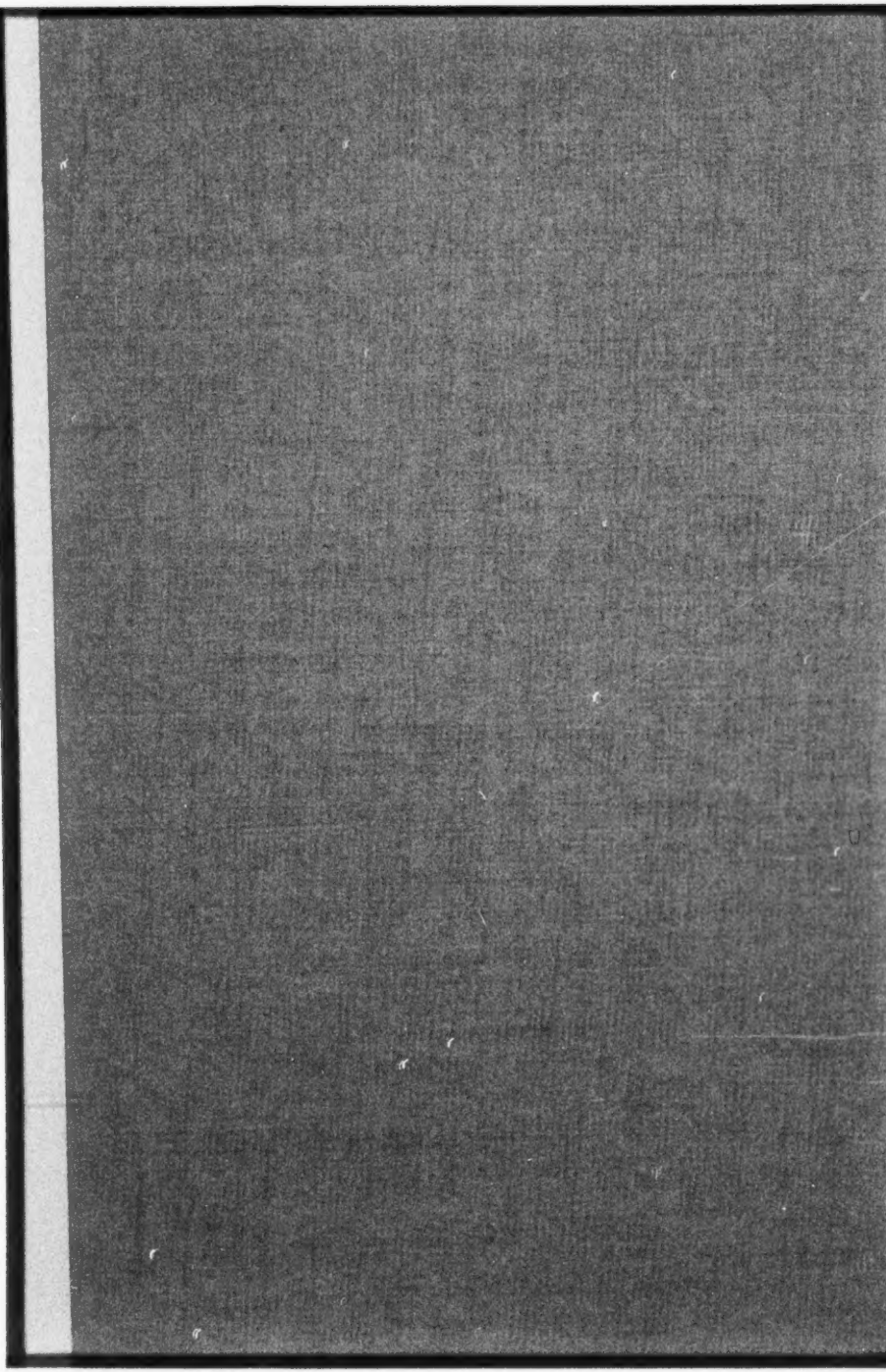

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Hocking Valley Railway Company brought this action in the Common Pleas Court of Cuyahoga County, Ohio, to recover from Swift & Company the sum of $656.00, representing demurrage which had accrued under a freight tariff relating wholly to Interstate Commerce. The defendant demurred to the amended petition on the ground that the facts stated therein were not sufficient to constitute a cause of action. (R. p. 34.) Since the demurrer admits the allegations of the amended petition, we will briefly review the admitted facts of the case. They are substantially as follows:

As required by the Interstate Commerce Act, the Railway Company issued and filed with the Interstate Commerce Commission its Interstate Freight Tariff, publishing the car demurrage rules and charges in question. (R. p. 25.)

The rules under which the demurrage was assessed provided in part as follows:

> "Private cars while in railroad service, whether on carrier's or private tracks are subject to these demurrage rules to the same extent as cars of railroad ownership.
>
> "Private cars under lading are in railroad service until the lading is removed and cars are regularly released.
>
> "After the expiration of the free time allowed, a charge of $1 per car per day or fraction of a day will be made until the car is released." (R. pp. 25, 28.)

Before the tariff was published these identical rules had been approved by the Interstate Commerce Commission, that tribunal having expressly held in the case of Proctor & Gamble Co. vs. C. H. & D. Ry. Co., et al., 19 I. C. C. Rep. 556, that this demurrage charge is one which the carrier has a right to impose. (R. p. 25.)

These rules were binding on all shippers of Interstate traffic over defendant in error's lines, including Swift & Company. (R. pp. 25, 26.)

Swift & Company entered into certain contracts of carriage with the Railway Company whereby the latter agreed to receive for transportation and to deliver to Swift & Company at Athens, Ohio, certain consignments of its products, in consideration of which it agreed to pay the Railway Company the charges arising out of and connected with their transportation, all as provided in its lawful published tariff and car demurrage rules and charges. (R. p. 26.)

Acting under and in pursuance of these contracts of carriage, the Railway Company received the cars in question at Chicago, Illinois, and delivered them to Swift & Company at Athens, Ohio. (R. p. 26.)

The cars in question were owned by Swift & Company and stood on Swift & Company's private track at Athens, Ohio. (R. pp. 26, 34.)

The Railway Company paid to Swift & Company for the use of said cars the agreed sum of ¾ of a cent per car per mile. (R. p. 26.)

Swift & Company failed to remove the lading from certain of the cars within the forty-eighty hours' free time allowed by the tariff, but permitted said cars to remain on the track under lading after the expiration of the free time, so that demurrage accrued under the aforesaid rules in the amount of $656.00, for which the Railway Company asked judgment. (R. pp. 26-7.)

The demurrer therefore admits that the tariff in question had been published and filed as required by the Interstate Commerce Act; that the rules whose validity is now challenged had been approved by the Interstate Commerce Commission; that the demurrage charge assessed under those rules had been held by the Commission to be one which the carrier had the right to impose, and that under the rules, demurrage in the amount of $656.00 has accrued.

The Common Pleas Court overruled Swift & Company's demurrer to the amended petition, and the defendant not desiring to plead further, judgment was entered for the plaintiff for the full amount claimed in the amended petition. This judgment was affirmed by the Court of Appeals of Cuyahoga County, and later by the Supreme Court of Ohio, the opinion being found on pages 39-44 of the record. The case is reported in 93 Oh. St. 143.

Swift & Company thereupon instituted the present proceeding in error, claiming an invasion of its constitutional rights. The Railway Company then filed its motion to dismiss the writ of error, or to affirm the judgment, which motion was overruled. The case was then

transferred to the summary docket. Counsel for plaintiff in error request us to state that they desire this Court to consider the matter on pp. 13-28 inclusive of their brief against the motion to dismiss or affirm, as plaintiff in error's principal brief in the case.

The Supreme Court of Ohio, as shown by the syllabus, which well states the law of the case, held as follows:

> "Where a demurrage rule, named in the tariff filed by an interstate railroad with the Interstate Commerce Commission and published according to law, has been passed upon and approved by the Commission, acting within the scope of its authority, the decision of that tribunal is binding upon the state courts, and the question of the validity of the rule is not open for consideration in an action brought by the railroad company to recover the charges assessed under the rule as to cars engaged in interstate commerce."

This proceeding in error presents the following questions for consideration by this Court:

I.

Did the Supreme Court of Ohio commit error in holding that the courts of a state are without authority to inquire into the validity of a demurrage rule which has been upheld by the Interstate Commerce Commission, and which is contained in a freight tariff relating solely to interstate commerce and duly filed and published as required by the Interstate Commerce Act?

II.

If the Supreme Court of Ohio did commit error in so holding, is the demurrage rule involved in this case invalid and unenforceable as claimed by the plaintiff in error?

ARGUMENT.

I.

The Demurrage Rules and the Charges Assessed Under Them Are Wholly Matters of Interstate Commerce, and as Such Come Within the Exclusive Jurisdiction of the Federal Government; Hence the Question of Their Validity Cannot be Raised in the State Courts, and the Supreme Court of Ohio Committed No Error in so Deciding.

Although specifically made one of the assignments of error (R. p. 4), counsel for plaintiff in error in their brief present no argument on this, the sole question decided by the Supreme Court of Ohio. Their discussion of the merits of the case (plaintiff in error's brief, pp. 13-28) has to do only with the second of the two questions stated above. Their contention, however, must necessarily be that a state court has the right to hold invalid, and therefore unenforceable, a demurrage rule which affects interstate commerce only, which has been upheld by the Interstate Commerce Commission, and which is contained in an interstate freight tariff duly filed and published as required by the Interstate Commerce Act.

That such a proposition utterly ignores the well defined limits of the power of a state over interstate commerce is, we believe, apparent upon its face. Moreover, it is contrary to the principles laid down in numerous decisions of this Court construing the comerce clause of the Federal Constitution and the Interstate Commerce Act itself, which decisions clearly establish the exclusive authority of the Federal Government over matters relating to interstate commerce.

1. Demurrage charged for the detention of cars used in interstate traffic is a terminal charge connected with interstate commerce, and a tariff providing for such demurrage must be filed with the Interstate Commerce Commission.

Section 6 of the Act (4 U. S. Comp. Stats. 1913, Sec. 8569), after providing that common carriers subject to the Act shall file all schedules with the Interstate Commerce Commission, and keep the same open to public inspection, provides further as follows:

> "The schedules * * * shall also state separately all **terminal** charges, **storage** charges, icing charges, and all other charges which the Commission may require."

In Berwind-White Co. vs. Chicago & Erie R. R., 235 U. S. 371, the first headnote, which well summarizes the law of the case on this point, reads in part as follows:

> "Filing with the Interstate Commerce Commission the book of rules as to **demurrage** of the Car Service Association, of which the railroad is a member, with a statement as to what its rates will be, **held**, in this case to be a compliance with the provisions of the Act to Regulate Commerce requiring filing of tariff sheets."

In Lehigh Valley R. R. Co. vs. U. S., 188 Fed. 879, the court in considering the question whether the Act to Regulate Commerce required those rules, tariffs and schedules relating to demurrage to be filed with the Interstate Commerce Commission, used the following language (p. 884):

> "That the Commerce Act requires that every common carrier engaged in interstate commerce shall file with the Interstate Commerce Commission, and publish and keep open for public inspection, all rates, fares, and charges, stating separately all terminal charges, **and that such terminal charges include demurrage charges,** is established (1) by the words of the Act; (2) by the decisions of the Interstate Commerce Commission; and (3) by the rulings of the Federal Courts."

In Michie vs. New York, N. H. & H. R. R. Co., 151 Fed. 694, the court, in considering whether a demurrage charge was included within the language of the Interstate Commerce Act held (p. 695):

> "The phrase of the statute 'delivering, storage or handling,' is broad enough to include demurrage."

See also:

U. S. vs. Texas & P. R. Co., 185 Fed. 820, 824.

That the Interstate Commerce Commission has given the same construction to the Act, see Wilson Produce Co. vs. Pa. R. R. Co., 14 I. C. C. 170, 174.

Moreover, the demurrer in the case at bar admits that the railway company filed the demurrage rules and charges with the Interstate Commerce Commission as required by the Act. (R. p. 25.)

That the foregoing decisions apply with equal force to private cars standing on private tracks is clear from the language of Section 1 of the Act, 4 U. S. Comp. Stats. 1913, Sec. 8563 (2) whereby "all the instrumentalities and facilities of shipment or carriage, **irrespective of ownership**, or of any contract express or implied for the use thereof," are included.

2. Since the demurrage rules and charges in question relate wholly to interstate commerce, they are matters within the exclusive jurisdiction of the Federal government, and their validity cannot be questioned in the courts of a State.

In the Minnesota Rate Cases, 230 U. S. 352, it was held (p. 399) that:

> "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on."

In Chicago, Rock Island & Pacific Ry. vs. Hardwick Farmers Elevator Co., 226 U. S. 426, the Minnesota Reciprocal Demurrage Law, which was enacted after the

passage of the Hepburn Act, imposed penalties on carriers for failing, on demand, to furnish a supply of cars for the movement of interstate traffic. This statute was held invalid on the ground that after the passage of the Hepburn Act the state was without power to enact such a law. In the opinion it is said (p. 435):

> "The elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme."

In St. Louis, Iron Mt. & S. Ry. Co. vs. Edwards, 227 U. S. 265, the Arkansas Demurrage Statute provided in substance that railroad companies should within twenty-four hours after the arrival of a shipment give notice thereof to the consignee, and imposed upon the carrier a penalty of $5.00 per car per day for its failure so to do. Under this statute a shipper recovered a judgment in the State Court of Arkansas for $75.00, the carrier having delayed giving notice to the consignee of the arrival of a carload of freight. The statute was held unconstitutional, as it attempted to vest in the State the power to regulate matters of interstate commerce.

Mr. Chief Justice White in delivering the opinion of the court, said (p. 268):

> "As applied to interstate commerce, * * * we think such penalties were not enforceable because of a want of power in the State to impose them in view of the legislation of Congress existing at the time the alleged duty to give notice arose."

If, therefore, a State is without power to pass a demurrage statute imposing penalties upon the carrier for failing to furnish cars for the movement of interstate traffic, or for failing to give notice of the arrival of cars used in interstate traffic, for the same reason a state is without power to inquire through its courts into the validity of a demurrage rule relating wholly to interstate commerce. If this were not the law, the demurrage

charge might be held legal in some of the states, and illegal in others, thereby creating the greatest confusion and inviting some of the very evils which the Act was designed to prevent.

3. The Federal Government through the Interstate Commerce Commission has exercised its jurisdiction over this subject-matter by holding that the demurrage rule involved is valid, and that under it a carrier may lawfully assess demurrage on private cars while the same are standing on private tracks.

The amended petition alleges, and the demurrer admits, that the demurrage rules and charges in question had previously been approved by the Interstate Commerce Commission in the case of Proctor & Gamble vs. C. H. & D. Ry., 19 I. C. C. Rep. 556. (R. p. 25.) In that case Proctor & Gamble owned certain private tracks located upon its own land. It also owned about 500 oil tank cars. The railroad companies had filed with the Interstate Commerce Commission tariffs of demurrage charges which contained the identical rules involved in this case. The carriers claimed the right under these rules to assess demurrage upon Proctor & Gamble's private cars while they were standing under lading on Proctor & Gamble's private track. Proctor & Gamble filed a complaint with the Interstate Commerce Commission objecting to the rules in so far as they provided for demurrage on private cars while standing on private tracks, and particularly to the provision that if private cars were returned under lading, the railroad service was not at an end until the lading was removed.

The Interstate Commerce Commission held, however, that the carriers were within their rights in establishing the rules complained of and in collecting demurrage under them, and hence dismissed the complaint. Proctor & Gamble then appealed to the Commerce Court,

which held with the Commission. 188 Fed. 221. They then appealed to this Court, which held that since the Commission's order was not an affirmative order, the Commerce Court had no jurisdiction of the case. 225 U. S. 282. The Commission's decision therefore stands as the law.

That the Commission in upholding this demurrage rule was acting upon a matter within its jurisdiction, is clearly shown by the opinion of this Court, where in the language of the present Chief Justice it is said (p. 292):

> "The question to be decided is this: Does the authority with which the Commerce Court is clothed in virtue of these provisions, invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment **and within its competency to consider**, has mistakenly refused."

If, as claimed by plaintiff in error, the courts of the State of Ohio **did** have power to inquire into the validity of this demurrage rule, they likewise had the power to hold it invalid and a rule with which the Railway Company was not obliged to comply. Yet the Interstate Commerce Act (4 U. S. Comp. Stats., 1913, Sec. 8597) makes it a misdemeanor to wilfully fail to strictly observe a tariff which has been filed and published as was the one in question. How the courts of a State can relieve a carrier from a duty enjoined upon it by the Interstate Commerce law under penalty is difficult to perceive.

To hold that a State court **may** question the validity of an interstate demurrage rule, upheld as this one has been by the Interstate Commerce Commission, would, in law, be to entirely disregard the principle that the Federal Government possesses full and exclusive authority over matters relating to Interstate Commerce, and would, in practice be to introduce the endless confusion which would inevitably result from different views being taken by the tribunals of the different States.

We therefore submit that the decision of the Supreme Court of Ohio that the courts of that state were without power to inquire into the validity of this demurrage rule, is not only free from error, but is in entire accord with the well established principles laid down by this Court. The judgment should therefore be affirmed.

II.

Even if the Courts of Ohio DID Have the Power to Question the Validity of This Demurrage Rule, Yet the Rule and the Charges Assessed Under It Are Legal, and Hence the Judgment Should be Affirmed.

On this branch of the case we will assume the law to be that the courts of Ohio were not precluded from inquiring into the validity of this demurrage rule merely because it was a matter of Interstate Commerce. We contend, however, that the rule is, in fact, valid and legal, and that even though the judgment of the Supreme Court of Ohio were placed on erroneous grounds, it is nevertheless correct in law, and should therefore be affirmed, for, as was said in Interstate Commerce Comm. vs. Ill. Cent. R. R., 215 U. S. 452, 471:

> "We must decide whether the action of the court below was correct, irrespective of the reasoning by which such action was induced."

1. The tariff in question, having been published and filed with the Interstate Commerce Commission as required by law, is absolutely binding on both carrier and shipper, and must be enforced by the courts until it is changed in the manner authorized by the Interstate Commerce Act.

The amended petition alleges, and the demurrer admits, that the tariff containing the demurrage rules and charges in question, was on February 26, 1910, published by the Railway Company and filed with the Interstate

Commerce Commission, as required by the act to regulate commerce. (R. p. 25.) This being true, this demurrage rule must be observed and enforced and the demurrage collected until the tariff is changed according to law.

The Act (4 U. S. Comp. Stats. 1913, Sec. 8597) provides that:

> "The wilful failure upon the part of any carrier subject to said Acts, to file and publish the tariffs or rates and charges as required by said Acts, **or strictly to observe such tariffs until changed according to law,** shall be a misdemeanor."

In Texas & Pacific Railway vs. Abilene Cotton Oil Co., 204 U. S. 426, this Court in referring to the Act, said (p. 437):

> "It made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act."

In Pennsylvania Railroad Co. vs. International Coal Co., 230 U. S. 184, it was held (p. 197), that:

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

That this applies to rules relating to demurrage and storage charges, see Southern Railway Co. vs. Prescott, 240 U. S. 632, 638.

It follows, therefore, that until the tariff is changed according to law, the demurrage rule must be enforced and the demurrage charges collected.

2. In the absence of prior action in this cause by the Interstate Commerce Commission, this Court should refuse to inquire into the validity of the demurrage rule and should affirm the judgment of the court below.

Plaintiff in error is asking this Court, in the absence of prior action by the Interstate Commerce Commission in this cause, to declare this demurrage rule unconstitutional on the ground that the correct interpretation of the Interstate Commerce Act will not sustain such a rule, and that its enforcement will deprive Swift & Company of its property without due process of law. (R. pp. 4-5; see also plaintiff in error's brief against motion to dismiss or affirm, p. 9.) This Court, however, has plainly held that such claims are subject to the precedent action of the Interstate Commerce Commission, and that action must first be taken by that tribunal before a shipper can attack the tariff provisions in the courts. In Proctor & Gamble vs. United States, 225 U. S. 282, where this identical rule was being attacked on precisely the same ground here urged, this Court said (p. 301):

> "If the constitutional question was involved in or depended upon the provisions of the act to regulate commerce, that question in the nature of things was subject to the precedent action of the commission on the subjects committed to it by the act to regulate commerce."

And in Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, this Court said (p. 488):

> "A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

Whether, therefore, the claim is that a published rate is unreasonable, or whether it is that the demurrage

rule is unconstitutional under the provisions of the Act to Regulate Commerce, prior action by the Interstate Commerce Commission is required in either case before the shipper can resort to the courts.

Nor is the requirement of precedent action by the Commission in this case supplied by its ruling in the Proctor & Gamble case. That ruling was made after the evidence bearing upon the entire situation was placed before the Commission. In the case at bar the record contains no evidence, the only question being the legal sufficiency of the amended petition, which was challenged by demurrer. The constitutionality or unconstitutionality of the demurrage rule may very well depend upon questions of fact, and we submit that this Court would hesitate long before declaring unconstitutional a rule which has been upheld by the Interstate Commerce Commission after a full hearing on the facts, when the record before the Court in the present case does not contain the facts which would naturally have been placed before the Commission had the matter been presented to it for prior determination. As was said in Knoxville vs. Water Co., 212 U. S. 1, 8:

> "The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court."

Furthermore, it is fundamental that the error jurisdiction of a court is limited to a review of the proceedings had in the same cause in the court below. Hence the decision of the Commission in another action between wholly different parties cannot be regarded as supplying the element necessary in this cause. It follows, therefore, that in the absence of prior action by the Commission in the present case, this Court should decline to consider the constitutional question, and should affirm the judgment of the court below.

If, however, we are in error as to this, we then submit that:

3. The demurrage rules should be upheld by this Court because their effect is to place private cars while in railroad service on precisely the same basis as cars owned by the carrier, thus avoiding some of the very evils which the Act to Regulate Commerce was designed to prevent.

The rules, which the demurrer admits were part of the contracts of carriage, provide in brief that private cars on private tracks are in railroad service until the lading is removed and the cars regularly released. The demurrer admits that these cars remained under lading after the expiration of the free time allowed by the tariff. (R. pp. 25-6.) Undeniably therefore, if the rules are valid, the cars were still in railroad service during the time for which demurrage was assessed.

The arguments both for and against these rules were reviewed at length by the Interstate Commerce Commission in the Proctor & Gamble case, 19 I. C. C. Rep. 556, and since they have already been before this Court for consideration (225 U. S. 282), we will not attempt to review the reasons which led up to their approval by the Commission. These rules were prepared by a committee of the National Association of Railway Commissioners, were adopted in convention by the National Association, and were subsequently approved by the Interstate Commerce Commission, although putting them in force was not imperatively prescribed by that body. It is sufficient to say that the Commission, after full consideration of the entire matter, concluded that there were sound reasons why private cars standing on private tracks should be regarded as remaining in railroad service until their contents had been removed and the cars regularly released.

Such a holding finds ample support in Interstate Commerce Commission vs. Ill. Cent. R. R. Co., 215 U. S. 452, relied upon by the Commission itself. In that case the carrier owned certain fuel cars which were loaded at the tipple with coal for its own use and were then distributed by it along its line. The question was whether the Interstate Commerce Commission could order these company fuel cars to be counted in the pro rata share of cars allotted to the particular mine in time of car shortage. The right of the Commission to make that order of course depended upon its jurisdiction over the private cars of the railroad company while they stood on its private tracks.

This Court stated the claim of the company in the following language (pp. 472-3):

> "When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee and no freight to be paid, and therefore, although there may be transportation, there is no shipment and hence no commerce; * * * that under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under the circumstances stated is not commerce, it is therefore not within the authority delegated to the Commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not therefore embrace that which is not commerce."

This contention, which is very similar to the one advanced by Swift and Co., was overruled by this Court, and it was held (p. 474):

> "That such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution, and the prevention of an unjust and discriminatory one."

This case clearly establishes the authority of the Commission over private cars standing on private tracks, and completely disposes of counsel's contention that after a private car is placed on a private track it immediately and necessarily, and in spite of the tariff provision to the contrary, passes out of the railroad service, is no longer subject to the regulatory power of the Commission, and hence is not bound by the provisions of an interstate freight tariff duly filed with and approved by the Commission.

We submit that in approving this demurrage rule the Commission was exercising the authority which the Act conferred upon it to fix the status of private cars; that the question as to when a private car passes out of railroad service is in its very nature an administrative question, and that the decision of the Commission in fixing the line of division will not be disturbed by this Court, except for very weighty reasons which do not appear in this case.

4. The demurrage rules are inherently valid and the charges assessed under them recoverable, because a part of the consideration moving to the Railway Company under the contracts of carriage was the promise of Swift & Co. to pay the charges in case they accrued, and, having accepted the benefits under the contracts, Swift & Co. cannot repudiate the obligations imposed by them.

Our final contention in this case is that Swift & Co. having entered into contracts of carriage providing among other things for the payment of these demurrage charges, and having accepted all the benefits which those contracts conferred upon it, cannot now repudiate this particular provision and withhold from the other party a part of the consideration moving to it under the contracts.

That the provisions of a published tariff form an essential part of the contract of carriage, and that Swift & Co. delivered these cars to the Railway Co., subject to the terms of the tariff then in force, are matters beyond dispute, for, as was said in C. R. I. & Pac. Ry. vs. Cramer, 232 U. S. 490, 493:

> "The provisions of the tariff enter into and form a part of the contract of shipment."

So also, it was said in American Sugar Refining Co. vs. D. L. & W. R. Co., 207 Fed., 733, 739:

> "When such schedules are once filed with the Commission, by its consent, and posted for the purpose of notice to all shippers, as required by the act, they may not in any respect be changed, altered, or modified, except in the manner prescribed in the act. Until so changed, every shipper delivers his goods for transportation to the carrier, subject to the terms imposed by such schedules, and until so changed, the carrier is under a **contractual** obligation to abide thereby."

See also:

Ga., Fla. & Ala. Ry. vs. Blish Co., 241 U. S. 190, 197.

Numerous rulings of this Court to the effect that both carrier and shipper are bound by the published tariff likewise justify the same conclusion.

Now what was the contract which the carrier and shipper entered into? The carrier, through the tariff, offered in substance to transport the private cars of Swift & Co. under certain conditions, one of which was that whether these cars stood on the carrier's or on private tracks, they should be regarded as remaining in railroad service until the lading was removed and the cars regularly released. There is, and of course there can be, no claim that these were conditions which the law expressly forbade.

While the offer as thus made was in force, Swift & Co. delivered these cars to the carrier for transportation. The carrier transported them to Athens, Ohio, re-

ceived the tariff rate of freight for so doing, and paid the owner, Swift & Co. the tariff rate of ¾ of a cent per car mile for the use of the cars. (R. p. 26.) Swift & Co. placed these cars on its private track at Athens and allowed them to remain there under lading and hence, by agreement, in railroad service, for a period in excess of the free time allowed in the tariff. (R. pp. 26-7.) This brought into operation that clause of the contract providing for the accrual of the demurrage in question. Upon demand being made for its payment, the carrier is met with the proposition that to require Swift & Co. to pay this demurrage in accordance with its agreement to do so, would result in the taking of its property without compensation and without due process of law.

Such a claim is in irreconcilable conflict with at least three well-established principles of law.

First, the acceptance of an offer must be according to the very terms in which the offer is made. Eliason vs. Henshaw, 4 Wheat. 225, 227; Carr vs. Duval, 14 Pet. 77, 83. Swift & Co., therefore, by delivering its cars to the Railway Company while the offer, that is, the published tariff, was in full force and effect, delivered them subject to the demurrage rules, and agreed to pay the demurrage in case it accrued just as much as it agreed to pay the freight itself.

Secondly, since the assessment of the demurrage under these rules was not forbidden by law, an agreement to pay it creates an obligation which the law will enforce. We have already seen that in the Proctor & Gamble case the Interstate Commerce Commission held that this demurrage charge is one which the carrier may lawfully impose. An agreement to do an act which is lawful will of course be enforced even where there would have been no obligation had there been no agreement. The agreement created the obligation. Counsel's claim, therefore, that in collecting what the Commission has held to

be a lawful charge, the Railway Company was "reaching out and taking toll on the private property of others" hardly meets the case. It is a maxim almost as old as the law itself that "as a man consents to bind himself so shall he be bound." Broom Legal Maxims *690.

Thirdly, Swift & Co. having accepted the benefits under the contracts will not be permitted to repudiate the burdens. The contracts of carriage provided that the cars should be regarded as a part of the carrier's equipment until the lading was removed, and the carrier accepted them on that understanding. Now, however, having accepted and retained the benefits of the contracts and having received from the Railway Company the tariff rate for the use of the cars, Swift & Co. would repudiate the burdens laid on it by the contracts, claiming that the cars cease to be a part of the carrier's equipment and go out of railroad service **before** the lading is removed, in plain contradiction to the agreement which it voluntarily entered into, which it has never rescinded, and which in all other respects it has ratified and affirmed.

That a party to a contract is estopped to adopt such a course has repeatedly been held by this Court. In International Contracting Co. vs. Lamont, 155 U. S. 303, this Court, speaking through the present Chief Justice, said (p. 309):

> "He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this he is estopped from denying the validity of the contract."

In McLean vs. Clapp, 141 U. S. 429, the late Justice Brewer, in delivering the opinion of the court, said in reference to one of the contracting parties (p. 432):

> "The law is clear that he cannot take the benefits of that contract and repudiate its burdens."

In Compania, etc., vs. Spanish-American Power & Light Co., 146 U. S., 483, this Court, in construing a certain clause in a contract of carriage, said (p. 496):

> "If the libellant seeks to enforce any part of the charter party, it must rely on the instrument as a whole; and it cannot affirm the charter party for one purpose and repudiate it for another."

In the present case, therefore, since the cars were delivered to the Railway Company under conditions which the Interstate Commerce Commission had previously held to be lawful, and since Swift & Co. has received and retained all of the benefits conferred upon it by the contracts, it will not now be permitted to repudiate its agreement by saying that one of the things it has promised to do ought not to be required of it.

As was said by the Commission in the Proctor & Gamble case (19 I. C. C. Rep. 556, 560):

> "The only question seems to be whether or not the demurrage rule is a condition attached to the use of the privately owned cars, which defendants may lawfully maintain.
>
> "Manifestly, the law does not impose upon defendants the obligation of hauling complainant's private cars. If used, it must be under an arrangement which is subscribed to by both, and which is stated definitely in defendant's tariffs. These defendants have said in their tariffs that they will use the privately owned cars and pay three-fourths of one cent per mile for such use, and will subject them to the demurrage rules. Complainant, having its cars in use under those conditions, now asks that we relieve it from one of the conditions, which defendants are unwilling to relinquish.
>
> "We are of the opinion that defendants are within their lawful rights in establishing and maintaining the rule complained of.
>
> "The complaint will be dismissed."

Irrespective of the question whether a carrier is bound to haul private cars, it may certainly impose as

a condition to their haulage such terms as have a reasonable relation to the service in which they are employed.

Hutchinson on Carriers, Secs. 111 to 113.
Harp vs. Choctaw, etc., R. R. Co., 125 Fed. 445, 450.
Robinson vs. B. & O. R. R. Co., 129 Fed. 753, 755.
U. S. vs. Oregon R. & N. Co., 159 Fed. 975, 979.

That these demurrage rules do bear that relation to the use of the cars in question is made entirely clear by the ruling of the Commission in the Proctor & Gamble case.

When the parties to the agreement have themselves fixed upon the point at which the cars should cease to be railroad equipment, and should become as other private property of the shipper, and when such an agreement has received the express approval of the Interstate Commerce Commission, we submit that this Court will enforce that contract according to its terms and will order the party guilty of the breach to perform the obligations which it has assumed.

For the reasons given, we respectfully ask that the judgment of the Supreme Court of Ohio be affirmed.

Respectfully submitted,

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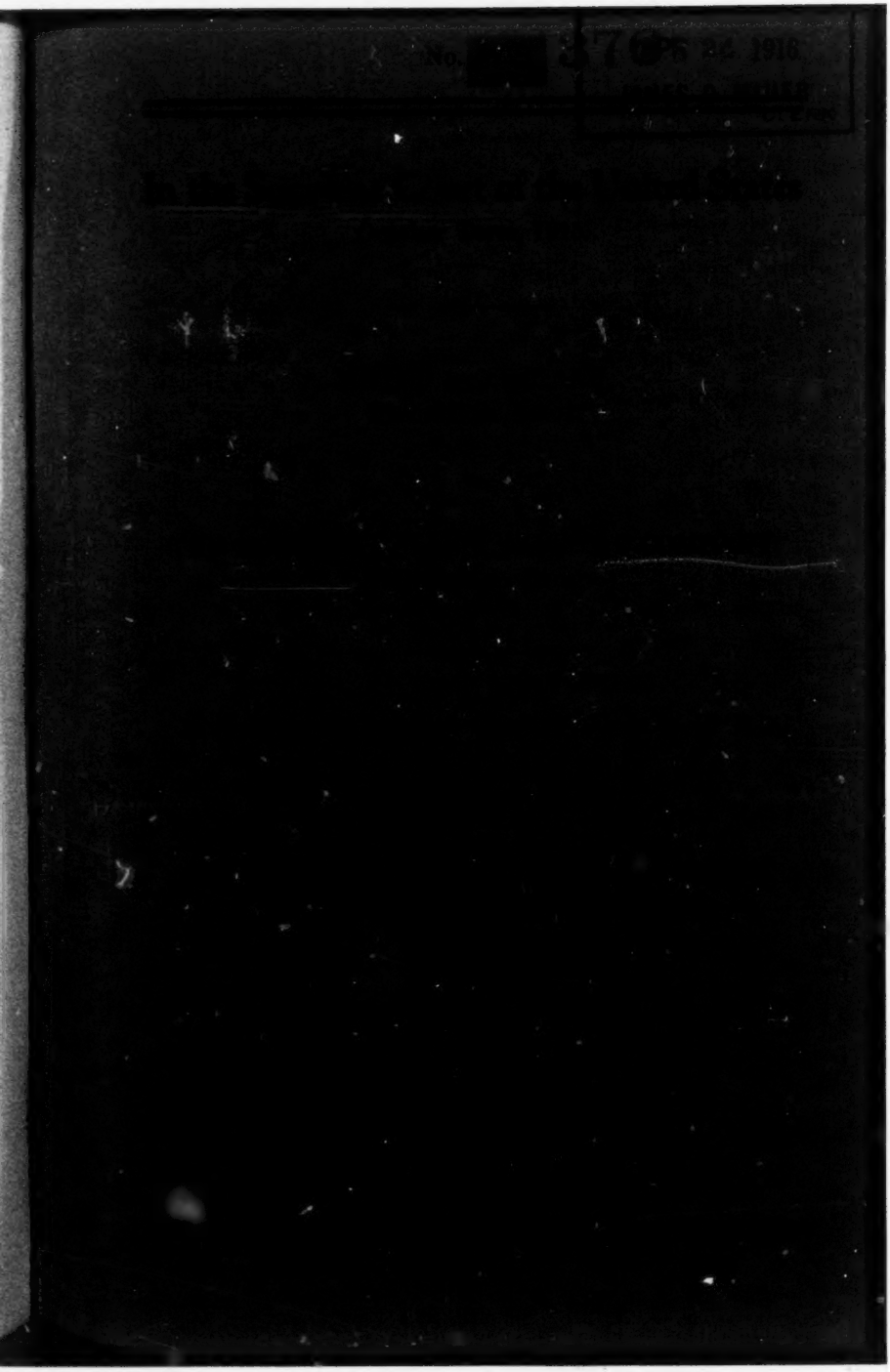

No. 843.

In the Supreme Court of the United States

October Term, 1915.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF PLAINTIFF IN ERROR AGAINST MOTION TO DISMISS OR AFFIRM.

SQUIRE, SANDERS & DEMPSEY,
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No. 843.

In the Supreme Court of the United States

October Term, 1915.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

STATEMENT OF THE CASE AND BRIEF OF ARGUMENT ON BEHALF OF THE PLAINTIFF IN ERROR AGAINST MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

This action was brought under the provisions of the Act of Congress to regulate commerce, to recover from the owner of private cars demurrage on its cars while on its private track.

The plaintiff below in its petition or statement of its cause of action, among other things averred that both the plaintiff and defendant were engaged in interstate commerce and that they were subject to the provisions of the Interstate Commerce Act and in accordance with the provisions of said Act had filed tariff schedules, including rules regulating charges for demurrage. They sought to recover demurrage under the following provision of said demurrage rules (See page 28 of the record):

"Private cars under lading are in railroad service until the lading is removed and cars are regularly released."

(This language is inaccurately quoted on page 25 of record, star page 55.)

There is no question arising on this record as to the control or ownership of these cars or tracks as it was expressly stipulated between parties to this suit that the tracks upon which the cars in question were placed were the private tracks of Swift and Company. (Record, page 34.) Thereupon, they sought to recover six hundred and fifty-six dollars ($656.00) for demurrage. To this petition the defendant below demurred, averring that the facts set forth in the petition were not sufficient to constitute a cause of action. (Record, page 34.) The issue being thus made up, the trial court overruled the demurrer and entered final judgment for the plaintiff. (Record, page 35.) The cause was then taken on error to the Court of Appeals of Cuyahoga County, Ohio, and the judgment of the Court of Common Pleas was affirmed. (Record, page 36.)

Under the Ohio practice regulating error proceedings, the Supreme Court of the State of Ohio has final jurisdiction, among other legal actions, of cases which the Supreme Court deems of great and general public interest, and it may on motion direct any Court of Appeals to certify its record to the Supreme Court for review. In this case such a motion was presented (Record, page 9) and allowed and the record was certified to the Supreme Court of Ohio, which is the court of last resort in that state.

In the motion to the Supreme Court of Ohio praying for an order to remove the record from the Court of Appeals of Cuyahoga County to the Supreme Court, it was averred by the plaintiff in error among other things, as follows (page 17 of the record):

"A tariff within the meaning of Section 6 of the Act to Regulate Commerce is a schedule of charges for transportation, and we submit that the failure of the defendant to unload its own cars standing on its track, was not 'transportation' as defined by the Act."

Again, page 16:

"Furthermore, there is no warrant in law for such charge for the reason that the carrier provides no transportation service or any service connected therewith within the meaning of that term as used in Section 1 of the Act to Regulate Commerce of the United States."

* * * * * * * * *

"This interpretation as applied to private cars under load, standing upon the private tracks of the owner, in our opinion, is absolutely contrary to justice and equity and to the principles of common law and is not supported by any provision in the Interstate Commerce Act."

Again on page 13:

"We deny that this Act (Act to Regulate Commerce) authorized the plaintiff to file such rule, if it applies to private cars delivered to the owner upon his own track, when such cars are used by a railroad under the so-called mileage arrangement, and we also deny that any rights accrued to the plaintiff by reason of the filing of such rule and so-called tariff. We do this for the reason that a tariff, within the meaning of the Act to Regulate Commerce, is a schedule of charges 'for transportation' and that the failure of the defendant to unload its own cars standing on its own track was not 'transportation' as defined by the Act.

"Transportation, as defined by the Act, includes cars and services in connection with the receipt and delivery of property transported, when provided and furnished by the carrier.

"Our contention is that the plaintiff did not provide and furnish 'transportation' for which it seeks to collect the charges involved in this proceeding."

The Supreme Court of Ohio affirmed the judgment and held (page 39) (star page 78):

> "Where a demurrage rule, named in the tariff by an interstate railroad with the Interstate Commerce Commission and published according to law, has been passed upon and approved by the Commission acting within the scope of its authority, the decision of that tribunal is binding upon the state courts and the question of the validity of the rule is not open for consideration in an action brought by the railroad company to recover the charges assessed under the rule as to cars engaged in interstate commerce."

And in the opinion of Newman, J. (page 41, star page 83), he says:

> "It is claimed, however, that within the meaning of the Interstate Commerce Act, tariff is a schedule of charges 'for transportation' and that transportation as defined by the Act includes cars and services in connection with the receipt and delivery of property transported when provided and furnished by the carrier. We cannot agree with counsel that the term is used in this narrow sense. In Section 8563, U. S. Comp. Stat., 1913, which is a part of the Interstate Commerce Act, the term 'transportation' is defined."
>
> * * * * * * * * *
>
> "This tariff containing the demurrage rule having been filed and published according to law was binding alike on carrier and shipper and so long as it was in force was to be treated as though it were a statute. Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184."
>
> * * * * * * * * *
>
> "But it is claimed that the demurrage rule in question is unlawful and therefore unenforceable. The matter under consideration has to do with interstate commerce. It was held in the Minnesota Rate Cases, 230 U. S. 352, that the authority of congress extends to every part of interstate commerce and to every instrumentality by which it is carried on and a full control by congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations."

Again, page 43, star page 87:

"Under the provisions of the Interstate Commerce Act, it was the positive duty of the carrier to collect the charges provided for in the tariff, and this is the purpose of the present action. The demurrage rule upon which plaintiff relies relates to interstate commerce. It was passed upon by a federal tribunal with full authority to act and was approved."

Again, page 44, star page 88:

"It is admitted by the demurrer that the transportation of the cars in question was subject to the demurrage rule set out in the tariff which was binding upon the shipper. This rule having been approved by a federal tribunal acting within the scope of its authority its decision must be followed by the courts of this state and be given full force and effect."

ARGUMENT AS TO JURISDICTION.

The motion to dismiss or affirm misconceives the ground upon which the plaintiff in error asserts federal jurisdiction of the questions involved in this record. The question before the Supreme Court of Ohio was the true interpretation of the Interstate Commerce Act. The defendant below and plaintiff here asserted and claimed that the true interpretation of this Act exempted it from liability for the demurrage charges claimed to be recovered in this action.

The trial court, the Court of Appeals and the Supreme Court of Ohio denied to the plaintiff the protection which the true construction of this Act entitled it to have. That this gives this Court jurisdiction to determine the true construction of the Interstate Commerce Act upon which this action is founded, is supported by numerous authorities.

In Nutt vs. Knut, 200 U. S., 12, the second headnote is:

> "A party who insists in the state court that a judgment cannot be rendered against him consistently with a statute of the United States asserts, within the meaning of Sec. 709, Rev. Stat., a right and immunity under such statute, although it might not give him a personal or affirmative right, enforceable in direct suit against his adversary, and a writ of error will lie from this court to review the judgment denying the existence of such right of immunity."

Mr. Justice Harlan delivering the opinion of the court, said, page 18:

> "The first question is one of the jurisdiction of this court. The present plaintiffs in error based their defense in part upon section 3477 of the Revised Statutes, which declares absolutely null and void certain transfers and assignments of claims against the United States. They insisted that the contract sued on was in violation of that statute; that they and the estate of Nutt were protected by its provisions against any judgment whatever in favor of the plaintiff. In every substantial sense, therefore, they asserted a right and immunity under a statute of the United States, and such right and immunity was denied to them by the Supreme Court of Mississippi."

In St. Louis, Iron Mountain and Southern Railway Company vs. Taylor, Administratrix, 210 U. S., 281, the sixth headnote is:

> "The denial by the state court to give to a federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the United States and presents a federal question reviewable by this court under Sec. 709, Rev. Stat."
>
> (This Statute, is now supplied by Section 237 of the Judicial Code.)

In support of this headnote, Mr. Justice Moody discusses this question at length, pages 292 and 293, saying on page 293:

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court."

* * * * * * * * *

"It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of federal questions reviewable here."

In Kansas City Southern Ry. Co. vs. C. H. Albers Com. Co., 223 U. S., 573, the first headnote is:

"The insistence in the state court by an interstate carrier that a shipper cannot recover excess collected over a special contract rate because the rate collected conformed to the applicable provisions of the Interstate Commerce Act is an adequate assertion of a right or immunity under that act, and this court can review judgment in favor of the shipper."

Mr. Justice Van Devanter, delivering the opinion of the court, said (page 590):

"Consideration must first be given to a motion to dismiss, advanced upon two grounds: (1) That no right or immunity under a statute of the United States was 'specially set up or claimed', within the meaning of Rev. Stat. Sec. 709, in the state courts."

* * * * * * * * *

Page 591:

"The first ground obviously is not tenable. The garnishee insisted throughout the proceedings that no recovery could be had against it consistently with the Interstate Commerce Act, because in disregarding the agreement for the special rate and in exact-

ing the proportional rate, first of 10 and later of 14 cents, it but conformed to the provisions of that act governing the rates to be applied to interstate shipments. This was an adequate assertion of a right or immunity under that act, for it named the act, indicated wherein it was claimed to be applicable, and invoked its protection. Nutt v. Knut, 200 U. S. 12; Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426."

In Seaboard Air Line Railway vs. Duvall, 225 U. S., 477, Mr. Justice Lurton, delivering the opinion of the court, said, page 486:

"This action was brought under an act of congress. If the act has been erroneously construed and exceptions saved, or if a particular construction to which the party asking was entitled, was denied, a right has been denied under the statute, and the question may be reviewed by this court." Citing St. Louis I. M. & S. Ry. v. Taylor, 210 U. S. 281, 293.

In Straus vs. American Publishers Association, 231 U. S., 222, the first headnote is:

"One who sets up a federal statute as giving immunity from a judgment against him, may bring the case here under Section 709, Rev. Stat., now Section 237 of the Judicial Code, if his claim is denied by the decisions of the state court."

Mr. Justice Day's language at page 233 supports the headnote above quoted.

In Southern Ry. Co. vs. Crockett, 234 U. S., page 725, the first headnote is:

"Motion to dismiss a writ of error to the state court to review a judgment in an action under the Employers' Liability Act in which the construction of the Safety Appliance Act was involved, denied."

Mr. Justice Pitney delivering the opinion of the court, says, page 730:

"There is a motion to dismiss, based upon the insistence that the record presents no question reviewable in this court under Sec. 237, Jud. Code (act

of March 3, 1911, c. 231, 36 Stat. 1087, 1156). The motion must be overruled, upon the authority of St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 293; Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 486; St. Louis, Iron Mountain & Southern Ry. v. McWhirter, 229 U. S. 265; Seaboard Air Line v. Horton, 233 U. S. 492, 499."

From the facts stated it appears that the petition of the plaintiff below was based upon the provisions of the Interstate Commerce Act and that throughout the courts of the state of Ohio the claim was asserted by the plaintiff in error for a construction of the Interstate Commerce Act, which if given in its favor would have relieved it from the judgment finally entered against it.

ON THE MERITS.

The question involved in this cause, namely, the liability of the owner of private cars to pay demurrage on the same while standing on the owners' tracks unloaded has never been decided by this Court. The question came up to this Court in the case of Procter and Gamble vs. United States of America and others, 225 U. S., 282, but was not decided. The Supreme Court of Ohio rests its opinion upon the rulings of the Interstate Commerce Commission as set out in that case. It is therefore necessary that the Procter and Gamble case should be considered at some length.

In the proceedings before the Interstate Commerce Commission by Procter and Gamble Co. vs. Cincinnati, Hamilton & Dayton R. R. Co., 19 I. C. C. Rep., 556, Clark, Commissioner, said, page 558:

> "Defendants' demurrage rules are what are commonly termed the 'Uniform Demurrage Rules.' They were prepared by a Committee of the National Association of Railway Commissioners, composed of a representative from each state that has

> a railroad commission, and a member of the Interstate Commerce Commission. The rules were fully considered and then adopted by the convention of the association, and were later approved, but not prescribed, by this Commission."

From the action of the Commission in that matter, an appeal was taken to the Commerce Court, where the decision was reviewed and affirmed, 188 Federal, 221, and from the decree of the Commerce Court an appeal was taken to the Supreme Court of the United States, but the demurrage question involved was not decided because this court held that the order of the Interstate Commerce Commission denying Procter & Gamble relief was a negative administrative order, from which no appeal could be taken to the Commerce Court, and further held that the legal questions involved were still within the jurisdiction of the District and Circuit Courts of the United States (225 U. S., 282), Chief Justice White, concluding his opinion, says (page 301):

> "As it follows from what we have said that the court below erred in taking jurisdiction of the petition, it results that our duty is to remand the cause to the court below with directions to dismiss the petition for want of jurisdiction."

The only question therefore determined by the Procter & Gamble case, so far as the Interstate Commerce Commission is concerned, was that Procter & Gamble were not entitled to any relief under the Act to Regulate Commerce, and that from such an order there was no appeal.

The question presented in this case could be raised by proceedings in equity to enjoin the plaintiff below from enforcing the rule in question on the ground that it is an unlawful rule and not based upon a transportation service or by doing as it did do in this particular case, raise the question by way of defense to an action to recover the damages claimed for the alleged violation of the rule.

The view of the Interstate Commerce Commission in the Procter & Gamble case seems to be founded on the theory not that the operation of the demurrage rule in question has produced any discrimination between shippers, but in some unknown and undefined way it might produce such discrimination, and therefore, it is necessary that the owner of a private car shall be deprived of the advantages which came to him by reason of the investment of his capital therein. It is not to be overlooked that there is no question in the present case involving unfair distribution of private cars. Commissioner Clark, in delivering his opinion, says, in effect, that the owner of such private cars might keep them upon his sidetrack and then demand an equal distribution of the cars belonging to the carrier, and having obtained his share, then he could add to it his private cars and thereby obtain an advantage. This is undoubtedly true, and is illegal as was held by this Court in Interstate Commerce Commission vs. I. C. R. R. Co., 215 U. S., 452.

Commissioner Clark, in discussing the Procter and Gamble case, says, 19 I. C. C., 560:

> "Manifestly the law does not impose upon defendants the obligation of hauling complainant's private cars; if used it must be under an arrangement which is subscribed to by both and which is stated definitely in defendant's tariffs. The defendants have said in their tariffs that they will use the privately owned cars and pay three-fourths of a cent per mile for such use and will subject them to the demurrage rules. Complainant having its cars in use under those conditions, now asks that we relieve it from one of the conditions which defendants are unwilling to relinquish. **We are of opinion that defendants are within their lawful rights in establishing and maintaining the rule complained of.**"

The Commission bases its ruling on the fact that the cars were used under a published tariff and the parties are bound by the terms thereof, and in this view the Su-

preme Court of Ohio concurred. This begs the whole question involved. For administrative purposes it is eminently proper and right for the Interstate Commerce Commission to require a carrier to enforce its published tariffs. The question therefore recurs,—Is it lawful for a carrier to prescribe a charge for not unloading privately owned cars on the owner's tracks after the transportation service in reference to the same has been finished and ended?

The Commissioner does not attempt to criticise, qualify or overrule the Commission's previous ruling in reference to privately owned tank cars hereinafter cited. He does not attempt to deal with the lawfulness of the rule. He simply lays down a hard and fast rule that, the tariff having been published, the demurrage rule is binding on the carrier and the shipper.

Such a statement does not conclude the legal question when it is raised as it is in this case before a court having jurisdiction thereof. Before the Interstate Commerce Commission it is an administrative question pure and simple. In the court below, as in this Court, it is a legal question to be determined according to the rules of law.

The rights and obligations of the owners of private cars were fairly raised before the Interstate Commerce Commission in the matter of demurrage charges on privately owned tank cars, 13 I. C. C. Rep., 378, Lane, Commissioner, saying (page 381):

> "It is, therefore, our conclusion that private cars owned by shippers and hired to carriers upon a mileage basis **are subject to demurrage when such cars stand upon the tracks of the carrier**, either at a point of origin or destination of shipment, **but are not so subject when upon either the private track of the owner of the car or the private track of the consignee.** The carrier must charge demurrage in all cases where such demurrage is imposed by tariff provision upon its own equipment, except when a

> privately owned car is upon a privately owned siding or track, and the carrier is paying, or is responsible for, no rental or other charge upon such car; and a privately owned car, in the sense in which that expression is here used, is a car owned and used by an individual, firm or corporation for the transportation of the commodities which they produce or in which they deal."

Thus you have a positive ruling by the Interstate Commerce Commission which exempts the defendant in this case from liability for demurrage, and on the other hand you have a ruling denying relief to a shipper because the demurrage rule was in a published tariff. The distinction between the two cases is founded solely on the proposition that in the latter case the rule was included in a published tariff, and therefore that tariff is binding upon the carrier company and they are required to enforce the rules which the carrier itself has promulgated. This may be a very good administrative proposition, but, we submit, it does not decide legal rights.

To the same effect as the Interstate Commerce Commission's ruling on privately owned tank cars, supra, is the ruling,—

In the Matter of the claim of the General Electric Co. vs. N. Y. C. & H. R. R. R. Co., Decision No. 91 of New York Public Service Commission, Second District, where it was held:

> "We decide simply that the private car returning to the home plant under load is not subject to demurrage after the loaded car has been delivered to the owning industrial company, and has been taken by that company upon its exclusively owned and operated tracks."

Furnishing free cartage on delivery of goods is not a transportation service, within the meaning of the Act to Regulate Commerce, and the failure of a railroad company to publish in its schedule of rates the fact of free

cartage at a certain place where it has been openly and notoriously granted to shippers and consignees for a quarter of a century is not a violation of Section 6 of the Act to Regulate Commerce.

I. C. C. vs. Detroit, G. H. & M. R. R. Co., 167 U. S., 633.

Justice Shiras delivering the opinion of the court, said (page 646), quoting Judge Cooley with approval:

> "The transportation as between the carrier and its patrons ends when the freights are received at the warehouse and the charge made is for a service, which ends there." 13 I. C. C., 613.

In Crosby vs. Richmond Transfer Co. et al., 23 I. C. C. Rep., 72, the Commission said:

> "Any service rendered after traffic passes from the hands of the carrier to those of the shipper or his agents is an ancillary service over which the Interstate Commerce Commission has no jurisdiction."

And again it says:

> **"A carrier's practices regarding delivery are within our regulative control, but where such practices follow delivery to the shipper the Commission is without power."**

What right has the plaintiff below acquired superior to the rights of the other artificial and natural persons that enables it to reach out and take toll on the private property of others entirely beyond its control and entirely beyond its responsibility? Does the fact that the carrier by its own measure of compensation allows the owner three-fourths of a cent a mile for every mile covered while the car is in motion between yard terminals, give it any right to the use of the car before or after delivery without a contract showing the assent of the owner of the car? If, so, then it may assess demurrage, not only upon private cars on the tracks of the owner as claimed in this action, but it may ascertain how many

cars are held on the private tracks of the owner which will be wanted for service in transportation and assess demurrage while so standing.

It may be to the business interest of the shipper that it load its cars, shove them back on its own siding so that they may be ready for quick delivery for transportation to meet the advantageous market, yet if this rule is sound the railroad company could assess demurrage upon such loaded cars. We do not contend that that is within the present rule, but we do contend that it is within the principle of the rule that allows them to claim demurrage on unloaded private cars on private tracks.

In Harp vs. Choctaw O. & G. R. Co., 125 Fed., 445, 452, Circuit Judge Thayer, delivering the opinion of the court, said:

> "The idea conveyed by the word 'preference' is that, as between two persons occupying the same situation or relation to the carrier, one has been preferred over the other, or granted certain privileges or facilities that were not extended to the other. Such is not the case which the evidence discloses. The plaintiff had not provided himself with a spur track leading to his mine for the storage of cars, while other shippers had done so. He desired to make use of the defendant's sidetrack and to stand cars thereon while he loaded them by the slow process of hauling coal to the station in wagons and shoveling it thence into the cars. The privilege which he demanded was essentially different from that accorded to other shippers who had built spur tracks on which cars could be placed and handled by the defendant with much less inconvenience and risk than when standing on its house tracks, which it used for handling other commodities, and for switching purposes, and probably used at times for the passage of trains. We fail to see how the delivery of cars to other shippers of coal on spur tracks which they had caused to be built can be fairly said to have been a preference extended to them or a discrimination against the plaintiff, who de-

sired to use the defendant's house tracks. The privilege which the plaintiff demanded was not accorded to other shippers, nor a substantially similar privilege. We think, therefore, that he has no just cause for complaint on this ground."

This case was cited with aproval by the Circuit Court, Western District of Missouri, in the case of F. H. Peavey & Co. vs. Union Pacific R. Co., 176 Fed. Rep., 409-419, in support of the following proposition:

"It is no part of the duty, nor is it within the power of the Commission, to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track and private cars, derives no greater profit from dealing in the groceries, or other articles he ships, than a shipper who has none of these facilities, to see that a shipper of coal, who owns a tipple from which he loads it, gains no greater profit from the handling of his coal than one who loads it from a wagon. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are attributable to that ownership and not to the transportation of the articles shipped, and the consideration and regulation of these advantages are without the scope of the Commission's power."

AS TO DEMURRAGE.

Demurrage may be defined as a charge for the use and occupation of a railroad car or the obstruction of a railroad track by the consignee for an unreasonable time after the contract for transportation has been fulfilled.

Norfolk & Western Railway Co. vs. Adams, 18 S. E. (Va.), 673, 22 L. R. A., 530, and note.
Barnes Interstate Transportation, Section 284.
9 A. & E. Encyc. L., 401.
2 Words & Phrases, 1981.

In Norfolk & Western Railway Co. vs. Adams, supra, the court said:

> "The charge is not for transportation, storage or delivery of freight * * * but it is for the use and occupation of the cars and the obstruction of their (railroad companies) tracks by the consignee. * * * It is neither a transportation charge, nor a storage charge, nor a terminal charge. * * * After arrival at the place of consignment and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for hire and can make reasonable rules and regulations and **charges for such service as bailee** as it may see fit. **Such charges are not carrier charges in the meaning, intendment or prescription of the statute.**"

The purpose of a demurrage charge is twofold:

1. As a compensation to the carrier for an additional service, and

2. As a penalty to influence the shipper to promptly unload and release the equipment of the railroad.

The present case does not involve in any way the question of the right of the plaintiff below to charge demurrage for unreasonable delay in unloading its cars or unreasonably obstructing the use of its tracks.

The claim for demurrage in this case is made on the theory that the owner of private cars on his own track is to be held to precisely the same liability and obligations in reference to unloading that he would be held to if the cars belonged to the carrier.

In the pending case what cars are subject to the demurrage rules? The answer in the language of the rule is (Record, page 27):

> "The following car demurrage rules will be applied at all stations and sidings (public or private) of this company on interstate traffic.

Rule 1—Exceptions.

Cars held for or by consignors or consigneees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

(A) Cars loaded with live stock.

(B) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.

(C) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

NOTE.—Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. **Private cars under lading** are in railroad service until the lading is removed **and cars are regularly released.** Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)"

If it were not for the expression "private cars under lading are in railroad service until the lading is removed and the cars are regularly released" there would be no foundation for the demurrage claim in this case.

The plaintiff below contended that this language meant that when it brought one of the defendant's private refrigerating cars to Athens, Ohio, loaded with its meat products and put it on the defendant's private side track that the defendant was bound to unload that car within the forty-eight hours of free time allowed under

the demurrage rule, and if it did so, then the car ceased to be in railroad service and could remain on the private track any length of time without being liable for demurrage, and this would practically mean that having once unloaded the car it could reload it with the same meat products and not be liable for demurrage. The effect of this would be that the refrigerated meat products would be exposed to the outside warm air to their injury and probable damage.

One naturally asks what right has a carrier to prescribe a rule for the unloading of a private car that results in such an absurdity. It has no interest in the track upon which the car stands; it has no interest in the car, nor yet its contents. Its bill of lading has been accomplished and its transportation service has been completed.

We respectfully submit that it is not lawful for a carrier to prescribe a rule or put such a construction upon the rule prescribed as is here contended for. Permitting a private car to stand upon the owner's sidetrack, loaded or unloaded, is neither a benefit nor disadvantage to the railway company.

Reduced to the final analysis, it is practically a fine levied by the railway company upon the property of the defendant below for not using its property as the carrier directs. To enforce such a penalty is a taking of the defendant's property without due process of law. **In this case at no time is it to be forgotten that this demurrage claim does not arise out of a transportation service. The transportation service ceased with the delivery of the cars to the defendant.**

If the position of the plaintiff below is sound, the defendant below might be compelled to sell its merchandise when it might be wiser to wait for a better market.

The authority of the Interstate Commerce Commission to pass upon and determine the reasonableness of

interstate freight rates is not denied, and this is likewise true of the reasonableness of demurrage rules so long as the rule is confined to a transportation service as defined by the Act of Congress. We respectfully submit, however, that it is not possible for a carrier by filing a tariff with the Interstate Commerce Commission in which it claims a given service to be a transportation service to preclude the courts in which a party has been sued from determining whether or not the demurrage rule invoked a transportation service.

The Act of Congress, U. S. Statutes, Supplement 1909 (page 1150), defines transportation as follows:

> "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

We freely concede that the cars of the plaintiff in error while in the hands of carriers for the purpose of transportation, are to be considered as railroad cars "irrespective of ownership or of any contract, express or implied, for the use thereof." What we contend is that the cars of the plaintiff in error, after delivery to its private siding, are not in use at all by the defendant in error. It is manifest, we think, that demurrage or damages for detention can only be applicable to the detention of cars when in railroad service. A private car when delivered to the owner on his own track has ceased to be in railroad service. We respectfully submit that a carrier has no more right to prescribe what use the plaintiff in

error shall make of its own property in its own custody under penalty of demurrage, than it would have to dictate to the plaintiff in error when it shall sell its meat products or to in any other manner interfere with its use of its own property as it might see fit. The plaintiff in error might destroy its car and no wrong would be done to the defendant in error by so doing.

If the carrier attempts to incorporate in its rules either a charge for a service or the allowance for a service that is not a transportation service, then the Interstate Commerce Commission is not the sole judge of the question. In other words, the carrier by incorporating in its rules a provision cannot give the Interstate Commerce Commission exclusive jurisdiction over a question when the Act of Congress has not given it to the Commission.

In Chicago & Alton Railway Company vs. United States, 156 Federal, 558, the same case, 26 L. R. A. (N. S.), 551, the note on page 552 is as follows:

> "So the handling of cars by a shipper within its plant is not a carrier's service which it is required to perform as part of its contract of transportation, and, hence the shipper is entitled to no allowance or compensation for such service and an allowance therefor is an illegal rebate." General Electric Co. v. New York C. & H. R. R. Co., 14 Inters. Com. Rep. 237; Solvay Process Co. v. Delaware, L. & W. R. Co., 14 Inters. Com. Rep. 246.

We submit that the demurrage rule in question properly interpreted does not apply to private cars on the owner's private track. The language of the rule is (Record, page 27):

> "Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows: * * *

(C) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper."

Exception "C" above quoted would clearly relieve the plaintiff in error from the claim for demurrage in this case, but accompanying the rule is a statement in parenthesis in which occurs the following language:

"Private cars under lading are in railroad service until the lading is removed and cars are regularly released."

The keynote of this language is the phrase "and cars are regularly released",—manifestly not to the owner on his own track, but to some one who has an interest in their being released. This language must be construed in connection with the language of the exception "C" above quoted, which means that a private car stored on private tracks or on tracks belonging to the railroad, but built for the purpose of having the cars stored thereon, are not subject to demurrage rules. Then to what does this language refer? We submit that it refers to a loaded private car when placed upon the private track of another person who is not the owner of the car. To give this language this construction makes it fulfill a beneficial and proper purpose, because the carrier company, having custody of the car as bailee for the owner, is in duty bound to see that it is promptly unloaded and promptly returned to the owner, and to enable it to enforce such an obligation against the consignee the rule provides that notwithstanding a loaded private car has been delivered to a private track, yet it must be unloaded under the demurrage rules and released to the railroad company for return to the owner.

The case of Pennsylvania Railroad Co. vs. Waverly Oil Works Company, 58 Pennsylvania Superior Court reports, 154, is an illustration that what we contend for

is the true interpretation of the language now under consideration. In this case private cars belonging to a consignor were consigned to and delivered to the private track of the Waverly Oil Company but were not unloaded by the Waverly Oil Company within the free time prescribed by the demurrage rule, and it was held that the Waverly Oil Company was liable for demurrage. To give any other construction to this language you must disregard the words "regularly released", because as above pointed out they refer to some one who is interested in having the car unloaded and released for use in transportation. Such further use by the owner of the car on his own private track is a matter entirely within the personal control of such owner.

As heretofore pointed out, demurrage charges do not arise as a part of transportation charges or in the character of the service of a common carrier. The carrier's bailment has ceased on delivery. It can collect no rent from the use of the car which it does not own. The car does not obstruct the carrier's tracks. It has no claim upon the car or the property in it after it has delivered the same to the owner on the owner's property.

To enforce this demurrage rule is to arbitrarily deprive the defendant of the use of its property contrary to the provisions of both the Federal and State Constitution and is not authorized by the Interstate Commerce Act which the plaintiff below relied upon as a foundation for its right of recovery.

The wisdom or expediency of the lawful discharge of the administrative duties of the Interstate Commerce Commission is not reviewable by the courts, but the courts may relieve from the orders of the Commission which are not authorized by statute or which result in depriving citizens of their property without due process of law or take it without just compensation.

We therefore submit that the obligation or duty of the defendant to unload its private cars on its own private siding is not an obligation or duty incident to transportation service within the meaning of the Act of Congress, and that the judgment of the Supreme Court of Ohio in this case should be reversed.

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY,
M. HAMPTON TODD,
WILLIAM L. DAY,
Attorneys for Swift & Company,
Plaintiff in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.

No. 843.

October Term, 1915.

Error to the Supreme Court of the State of Ohio.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto that in order to correct a clerical error occurring in the opinion of the Supreme Court of Ohio as certified by the Reporter of said court, and to make the recital therein conform to the fact, the word "unloaded" found on page 41 of the printed Record herein in the third line of the opinion of said court, as rendered by Newman, J., be stricken out, and the words "under lading" be substituted therefor, so as to make the last clause of the first sentence of said opinion to read as follows: "while under lading on private tracks."

SWIFT & COMPANY,
Plaintiff in Error,
By WILLIAM L. DAY,
Its Counsel.

THE HOCKING VALLEY
RAILWAY COMPANY,
Defendant in Error,
By JAMES H. HOYT,
Its Counsel.

Cleveland, O., April 3rd, 1916.

In the Supreme Court of the United States

October Term, 1915.

No. 376

Error to the Supreme Court of the State of Ohio.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT IN SUPPORT THEREOF.

HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Defendant in Error.

JAMES H. HOYT,
C. M. HORN,
Of Counsel.

In the Supreme Court of the United States

October Term, 1915.

No. 843.

Error to the Supreme Court of the State of Ohio.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT IN SUPPORT THEREOF.

HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Defendant in Error.

JAMES H. HOYT,
C. M. HORN,
Of Counsel.

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In the Supreme Court of the United States

October Term, 1915.

No. 843.

Error to the Supreme Court of the State of Ohio.

SWIFT & COMPANY,
Plaintiff in Error,

vs.

THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

MOTION TO DISMISS OR AFFIRM.

Now comes The Hocking Valley Railway Company, defendant in error herein, by its attorneys, and moves this Court in the alternative either to dismiss the writ of error herein or to affirm the judgment of the Supreme Court of the State of Ohio, on the following grounds and for the following reasons, to-wit:

1. Because it appears from the record that the final judgment or decree in the Supreme Court of the State of Ohio did not draw in question the validity of a treaty or statute of, or an authority exercised under, the United States, nor was its decision against the validity of any such treaty, statute or authority.

2. Because it appears from the record that said judgment did not draw in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, nor

was its decision in favor of the validity of any such statute or authority.

3. Because it appears from the record that no title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, nor was the decision of the Supreme Court of the State of Ohio against any such title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, or authority, nor was any Federal question raised in or considered by said Supreme Court of the State of Ohio.

4. Said defendant in error also moves this court in the alternative to affirm the judgment of the Supreme Court of the State of Ohio on the ground that it appears from the record that said judgment is in accordance with the decisions of this court, and that it is manifest that the writ of error herein was taken for delay only, and that the questions on which the decision of this cause depend are so frivolous as not to need further argument.

THE HOCKING VALLEY
RAILWAY COMPANY,
By HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Its Attorneys.

IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1915.
No. 843.
Error to the Supreme Court of the State of Ohio.

SWIFT & COMPANY,
Plaintiff in Error,
vs.
THE HOCKING VALLEY RAILWAY COMPANY,
Defendant in Error.

NOTICE OF MOTION, ACKNOWLEDGMENT OF SERVICE OF SAME AND OF COPY OF BRIEF.

Messrs. Squire, Sanders & Dempsey,
Leader-News Building,
Cleveland, Ohio.

Gentlemen:

You are hereby notified that a motion to dismiss the writ of error herein or to affirm the judgment of the Supreme Court of the State of Ohio will be filed in the Supreme Court of the United States, under Rule 6 of the Rules of said Court, and that said motion will be submitted to said Court on Monday, April 24, 1916.

HOYT, DUSTIN, KELLEY,
McKEEHAN & ANDREWS,
Attorneys for Defendant in Error.

Service of the foregoing notice and of a copy of the motion therein referred to, and of a copy of the brief of argument in support thereof, is hereby acknowledged, this 24th day of March, 1916.

SQUIRE, SANDERS & DEMPSEY,
Attorneys for Plaintiff in Error.

WILLIAM L. DAY,
Of Counsel.

HISTORY OF THE CASE.

This cause originated in the Common Pleas Court of Cuyahoga County, Ohio, the amended petition alleging that Swift & Company was indebted to the Railway Company for demurrage which accrued under a rule contained in a freight tariff relating to Interstate Commerce. This tariff, which had been duly filed with the Interstate Commerce Commission, is found on pages 27 et seq. of the Record, and provided among other things that

> "Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership. * * *
>
> "Private cars under lading are in railroad service until the lading is removed and cars are regularly released." (R., p. 28.)

The cars upon which the demurrage accrued were owned by Swift & Company and stood on its private track at Athens, Ohio, under lading after the expiration of the free time allowed by the tariff. Demurrage to the extent of $656.00 accrued, to recover which this action was brought.

Swift & Company demurred to the amended petition on the ground that the facts stated therein were not sufficient to constitute a cause of action (R., p. 34). The Common Pleas Court overruled this demurrer, and defendant not desiring to plead further, final judgment was rendered for the plaintiff as prayed for in the amended petition (R., p. 35).

Swift & Company then filed its petition in error in the Court of Appeals of Cuyahoga County, Ohio, which court affirmed the judgment rendered by the court below (R., pp. 35-6).

Thereupon, Swift & Company filed its motion in the Supreme Court of Ohio for an order directing the Court of Appeals to certify its record to the Supreme Court (R.,

pp. 9-10), which motion was granted (R., p. 39), and thereafter Swift & Company filed its petition in error in the Supreme Court of Ohio (R., pp. 23-4). In due time the cause was heard on its merits, and the judgment of the Court of Appeals was affirmed (R., p. 39). The opinion of the Supreme Court is found on pages 39-44 of the Record.

[Note: Attention is called to a clerical error occurring in the third line of the opinion as rendered by Newman, J. (Rec., p. 41), to-wit: "unloaded" should obviously be changed to "under lading".]

Thus far the Record contains absolutely no reference to any Federal question. Neither in the demurrer, nor in the petitions in error, nor in the journal entries of affirmance, nor in the opinion of the Supreme Court is there any intimation of the existence of a Federal question, or anything to call that court's attention to the fact that a right under the Federal Constitution was being relied upon. It makes its initial appearance in the assignment of errors filed with the petition for a writ of error to the United States Supreme Court and in the writ of error issued thereon (R., pp. 1-5). In this state of the Record we contend that the writ of error should be dismissed by this Court for want of jurisdiction.

ARGUMENT.

SINCE THE RECORD FAILS TO SHOW THAT ANY FEDERAL QUESTION WAS RAISED IN THE STATE COURTS, OR WAS CONSIDERED OR DECIDED BY THEM, THE WRIT OF ERROR HEREIN SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

It appears from the assignment of errors, (R., pp. 3-5) that a review of this cause is sought on the ground that it falls within the third class of cases reviewable under Section 237 of the Judicial Code (1 Comp. Stat., 1913, Sec. 1214), the claim being that the demurrage rule complained of deprived Swift & Company of certain rights, privileges and immunities guaranteed it by the Federal Constitution.

We have already stated that nowhere in the record of the proceedings in the State Courts is there any intimation that any rights under the Federal Constitution were being claimed by Swift & Company, and that such claim first appears in the assignment of errors filed with the petition for writ of error. Let us now proceed to a closer examination of the Record.

The amended petition prays for the recovery of $656.00, representing demurrage which was assessed under a rule contained in an Interstate freight tariff duly filed with the Interstate Commerce Commission, which demurrage, it was alleged, Swift & Company, contrary to its agreement, had refused to pay (R., pp. 24-7).

The sole ground stated in the demurrer filed to this amended petition was that it did not contain facts sufficient to constitute a cause of action. Neither the demurrer, nor the order overruling it and entering final judgment, contain any reference to a Federal question (R., pp. 34-5). Thereafter Swift & Company filed its petition in error in the Court of Appeals, alleging simply (1) that the lower court erred in overruling the demurrer,

(2) that the judgment of the court was contrary to law, and (3) that there were other errors apparent upon the face of the record (R., pp. 35-6). Neither this petition in error, nor the order of the Court of Appeals affirming the judgment below, contain any reference to a Federal question.

Under Art. IV, Sec. 2, of the Constitution of Ohio, the Court of Appeals has final jurisdiction in by far the greater number of causes, and the jurisdiction of the Supreme Court is limited to certain classes of cases, only two of which concern us here: (1) cases involving questions arising under the Constitution of the United States or of the State of Ohio, and in these a petition in error setting up these questions may be filed in the Supreme Court as a matter of right.

(2) In cases which the Supreme Court deems of public or great general interest, it may, on motion, direct any Court of Appeals to certify its record to the Supreme Court for review.

This Court had occasion to notice the limited jurisdiction of the Supreme Court of Ohio in the recent case of Stratton vs. Stratton, 239 U. S., 55, 56.

The case at bar reached the Supreme Court of Ohio by the second of these two methods, and a review in that court was asked, not on the ground that a question arising under either the State or the Federal Constitution was involved, but solely on the ground that "(1) The case is of public and great general interest, (2) error has probably intervened." (R., pp. 9-10), and it was on these grounds that the motion was granted (R., p. 39).

It is perfectly clear, therefore, that a review by the Supreme Court of Ohio was asked and obtained, not on any constitutional grounds, but simply because that court deemed the issue presented one of public and great general interest. In conformity with the state practice, Swift & Company after the allowance of the above mo-

tion, filed its petition in error in the Supreme Court of Ohio (R., pp. 23-4). An examination of that pleading will disclose that not one of the seven assignments of error referred even remotely to any Federal question, or in any way called the attention of the court to the fact that it was being asked to pass upon any right or privilege which Swift & Company was claiming under the Federal Constitution.

Thereafter, the cause was argued on its merits, and on December 7, 1915, the judgment of the Court of Appeals was affirmed (R., p. 39). The order of affirmance shows that no Federal question was raised in, or considered, or decided by the Supreme Court, and that no title, right, privilege or immunity under the Federal Constitution was in any way set up or claimed by either party, or was considered or decided by the court.

Moreover, the court's opinion found on pages 39-44 of the Record neither refers to nor discusses any such issue, but on the other hand, shows that the case was decided upon an entirely different ground, to-wit: that, in accordance with the adjudications of the Supreme Court of the United States, the state courts cannot inquire into the validity of an Interstate demurrage rule filed with and approved by the Interstate Commerce Commission.

Thus, nowhere in the transcript of the proceedings in the state courts,—from the filing of the demurrer in the Court of Common Pleas to the final order of affirmance and the opinion by the Supreme Court,—is there the slightest reference to a claim, the existence and denial of which are essential to the jurisdiction of this Court.

On the other hand, the Federal question is first made in the assignment of errors filed with the petition for writ of error to the United States Supreme Court on January 26, 1916 (R., pp. 3-5).

This Court has many times held that where the Federal question was raised for the first time in the petition for writ of error and assignment of errors, this Court is without jurisdiction. In Manhattan Life Ins. Co. vs. Cohen, 234 U. S., 123, Mr. Chief Justice White said (p. 134):

> "It is elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this court."

In Cleveland & Pittsburgh R. R. Co. vs. City of Cleveland, Ohio, 235 U. S., 50, it was said by Mr. Justice Day (p. 53):

> "In order to bring a case here under §237 of the Judicial Code (formerly §709 of the Revised Statutes of the United States), it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court cannot be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion." (Citing authorities.)

In Appleby vs. Buffalo, 221 U. S., 524, it was said (p. 529):

> "But it is well settled that the assignments of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here."

In Thomas vs. Iowa, 209 U. S., 258, the court in referring to the Federal question said (p. 263):

> "It is too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here."

In Warfield vs. Chaffe, 91 U. S., 690, the syllabus, which well states the law of the case, reads as follows:

> "The petition for the allowance of a writ of error forms no part of the record of the court below;

and this court has no jurisdiction to determine a Federal question presented in such petition, but not disclosed by the record sent here from the state court."

That this is the law even where the Chief Justice of the highest court of the state allowed the writ, as was done in the case at bar, is held in Hulbert vs. Chicago, 202 U. S., 275, where this court speaking through Mr. Justice McKenna, said (p. 280):

> "It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and, it is further urged, that the chief justice of the court allowed the writ of error. This is not sufficient. Marvin vs. Trout, 199 U. S., 212, 223."

On the other hand it has been repeatedly held that in order to give this court jurisdiction it must affirmatively appear from the record that the right or privilege claimed under the Federal constitution was clearly and unmistakably set up in the highest court of the state. We will refer only to certain leading cases.

In Crowell vs. Randell, 10 Pet., 368, the second syllabus, which is in the language used by Mr. Justice Story in the opinion (p. 391), reads as follows:

> "In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a de-

cision might have been made in the court below. It must be demonstrable that they did exist, and were made."

In Maxwell vs Newbold, 18 How., 511, Mr. Chief Justice Taney, in referring to the power of this court to review a constitutional right denied by the state court, said (p. 515):

> "But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state court, and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was, in fact, raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it."

In Oxley Stave Co. vs. Butler County, 166 U. S., 648, the syllabus, which well states the law of the case, reads as follows:

> "This court cannot review the final judgment of the highest court of a state even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the state court as belonging to such party under the constitution or some treaty, statute, commission or authority of the United States. Rev. Stat., Sec. 709.
>
> "The words 'specially set up or claimed' in that section imply that if a party in a suit in a state court intends to invoke for the protection of his rights the constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare, 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

In the opinion, which was rendered by Mr. Justice Harlan, this court said, (p. 655):

> "The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

See to the same effect:

Hamilton Co. vs. Massachusetts, 6 Wall., 632;
Spies vs. Illinois, 123 U. S., 131;
Sayward vs. Denny, 158 U. S., 180;
Chicago & Northwestern Ry. Co. vs. Chicago, 164 U. S., 454;
Mutual Life Ins. Co. vs. McGrew, 188 U. S., 291;
Capital Bank vs. Cadiz Bank, 172 U. S., 425;
Michigan Sugar Co. vs. Michigan, 185 U. S., 112;
Waters-Pierce Oil Co. vs. Texas, 212 U. S., 86.

This Court has repeatedly held that one of the ways in which such a claim may be specially set up as required, is by making the denial of it one of the assignments of error in the State Supreme Court.

In Rothschild vs. Knight, 184 U. S., 334, Mr. Justice McKenna said (p. 339):

> "A motion is made to dismiss the writ of error upon the ground that no Federal question was raised in the Superior Court. Federal questions were raised however on writ of error to the Supreme Court, and that, we think, was a sufficient claim." (Citing authorities)

In Johnson vs. New York Life Ins. Co., 187 U. S., 491, this Court in referring to the manner in which the constitutional right claimed by the plaintiff in error should have been set up, said (p. 495):

> "It was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State."

In San Jose Land & Water Co. vs. San Jose Ranch Co., 189 U. S., 177, where a motion was made to dismiss the writ of error upon the ground that no Federal right, title, privilege or immunity was "specially set up or claimed" by the plaintiff in error as required by the statute, this Court said (p. 179):

> "None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial, and in the assignments of error in the State Supreme Court."

In Waters-Pierce Oil Co. vs. Texas, 212 U. S., 112, it was said, (p. 115):

> "It is well settled in this court that a review of the judgment of the State Court is confined to the assignments of error made and passed upon in the judgment of the State Court brought here for review."

See also:

Simmerman vs. Nebraska, 116 U. S., 54;
Texas, etc., Ry Co. vs. Southern Pacific Co., 137 U. S., 48, 52;
Powell vs. Brunswick County, 150 U. S., 433, 435;
Miller vs. Texas, 153 U. S., 535, 538.

The foregoing cases conclusively show that on the record in the case at bar this court is without jurisdiction. Not only does the record fail to show clearly and beyond question that Swift & Company was claiming rights under the Federal constitution in the Supreme Court of Ohio, but on the other hand, the entire record of the proceedings in the state courts is utterly silent upon that subject.

On this state of the record we respectfully submit that the writ of error should be dismissed.

In the event, however, that the court holds that it has jurisdiction, we then submit that under section 5 of rule 6 of this court, the judgment should be affirmed.

THE JUDGMENT OF THE SUPREME COURT OF OHIO SHOULD BE AFFIRMED, SINCE THE RECORD SHOWS THAT IT IS IN ACCORDANCE WITH THE REPEATED ADJUDICATIONS OF THIS COURT, AND HENCE IT IS MANIFEST THAT THE WRIT OF ERROR WAS TAKEN FOR DELAY ONLY, AND THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPEND ARE SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT.

The syllabus preceding the opinion of the Supreme Court of Ohio well states the law of the case, and reads as follows (R., p. 39):

> "Where a demurrage rule, named in the tariff filed by an interstate railroad with the interstate commerce commission and published according to law, has been passed upon and approved by the commission acting within the scope of its authority, the decision of that tribunal is binding upon the state courts, and the question of the validity of the rule is not open for consideration in an action brought by the railroad company to recover the charges assessed under the rule as to cars engaged in interstate commerce."

The amended petition alleged and the demurrer admitted that the tariff containing this demurrage rule had been duly filed with the Interstate Commerce Commission (R., p. 25).

This identical rule was, as stated in the above syllabus, passed upon and approved by the Interstate Commerce Commission in Proctor & Gamble Co. vs. Cincinnati, Hamilton & Dayton Ry. Co., 19 Interstate C. C. Rep., 556, where it was held that the carriers were within their lawful rights in establishing and maintaining the rule complained of. The opinion rendered by the Commission so clearly sets forth the grounds of its decision that nothing need be added here.

Upon this decision being made, Proctor & Gamble filed a petition in the Commerce Court, asking it to set aside the order of the Commission upholding the demurrage rule. The Commerce Court, however, affirmed the order of the Commission (188 Fed., 221). Proctor & Gamble then appealed to the Supreme Court of the United States and this court held that since the act creating the Commerce Court conferred upon it jurisdiction to review affirmative orders of the Commission only, the Commerce Court had erred in assuming jurisdiction of the cause. Proctor & Gamble vs. U. S., 225 U. S., 282. Thus the decision of the Commission upholding the demurrage rule was left standing as the law.

That the Commission in upholding the rule was acting within the scope of its authority, as stated in the syllabus in the case at bar, is clearly shown by the language used by Mr. Chief Justice White on page 292 of the opinion, where it is said:

> "The question to be decided is this: Does the authority with which the Commerce Court is clothed in virtue of these provisions invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, **in a matter submitted to its judgment and within its competency to consider,** has mistakenly refused?"

That the Supreme Court of Ohio, in holding that the validity of a demurrage rule which affects interstate commerce and which had been approved by the Interstate Commerce Commission is not open to question in the state courts, was but following the repeated adjudications of this Court, is clear from the following authorities.

In The Minnesota Rate Cases, 230 U. S., 352, this Court speaking through Mr. Justice Hughes, said (p. 399):

> "There is no room in our scheme of government for the assertion of state power in hostility to

the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on."

In Chicago, Rock Island & Pac. Ry. Co. vs. Hardwick Elevator Co., 226 U. S., 426, where the validity of a demurrage law passed by the legislature of Minnesota was involved, the law was held invalid because in its operation it attempted to regulate interstate commerce. This Court, speaking through Mr. Chief Justice White, said (p. 435):

> "The elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the state may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had not inherent but only permissive power. Southern Ry. Co. v. Reid, 222 U. S., 424."

Hence, in Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, it was held that:

> "A shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier, according to the act and had not been found to be unreasonable by the Interstate Commerce Commission."

See also:

St. L., Iron Mt. & S. Ry. Co. vs. Edwards, 227 U. S., 265;
Penna. R. R. vs. International Coal Co., 230 U. S., 184, 196;
Robinson vs. B. & O. R .R. Co., 222 U. S., 506.

We therefore submit that a careful analysis of the syllabus and opinion in the present case will conclusively show that the entire question was decided by the Supreme Court of Ohio in accordance with and upon the authority of the decisions of this Court. Such being the case, the judgment should be affirmed, for this Court, speaking through Mr. Chief Justice Waite, held in Spies vs. Illinois, 123 U. S., 131, 164, that:

> "The writ ought not be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well considered judgments in similar cases."

That this principle applies with equal force when a motion is made to dismiss or affirm, see the authorities there cited.

Respectfully submitted,

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